(19,409.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 57.

HENRY FRENCH (SUBSTITUTED IN PLACE OF SARAH WOODWARD, AND JOHN H. McGRAW, AS ADMINISTRATOR OF THE ESTATE OF HENRY S. WOODWARD, DECEASED), PLAINTIFF IN ERROR,

vs.

H. C. TAYLOR AND LIDA R. TAYLOR, HIS WIFE, AND J. W. McCONNAUGHEY, D. F. McCONNAUGHEY, AND C. K. McCONNAUGHEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1 In the Superior Court of the State of Washington for King County.

SARAH WOODARD and SARAH WOODARD, as Executrix and Sole Heir of the Last Will and Testament of Henry S. Woodard, Deceased, Plaintiffs,
vs.
H. C. TAYLOR and LIDA R. TAYLOR, His Wife; J. W. McConnaughey, D. F. McConnaughey, C. K. McConnaughey, and Isabel C. Jones, Defendants.
} Summons.

STATE OF WASHINGTON:

To H. C. Taylor and Lida R. Taylor, his wife; J. W. McConnaughey, D. F. McConnaughey, C. K. McConnaughey, and Isabel C. Jones, defendants:

You are hereby summoned to appear within twenty (20) days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, which will be filed with the clerk of the above entitled court, or a copy of which is herewith served upon you.

T. O. ABBOTT,
Attorney for Plaintiffs,
408–10 Equitable Bldg., Tacoma, Wash.

Filed Mar. 28, 1901.
C. A. KOEPFLI, Clerk.

2 In the Superior Court of the State of Washington for King County.

SARAH WOODWARD and JOHN H. McGraw, as Administrator With the Will Annexed of the Estate of Henry S. Woodward, Deceased, Plaintiffs,
vs.
H. C. TAYLOR and LIDA R. TAYLOR, His Wife; J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants.
} Amended Complaint.

Come now the plaintiffs upon leave of court first obtained, and complain against the defendant-, and for cause of complaint allege as follows:

For a first cause of action.

I.

That on the 18th day of September, 1892, Henry S. Woodward died testate, leaving as his last will and testament, an instrument in writing, wherein and whereby the plaintiff, Sarah Woodward and one Edward Von Tobel were nominated and appointed as the executors thereof; that in and by the terms of said will, Sarah Woodward was made the sole heir during her lifetime, of the said Henry S. Woodward, and it was provided therein that said executors should proceed to settle and close up all the business and affairs of said estate and to execute said last will and testament in the manner procided therein without bonds, and that letters testamentary should not be required, and without the interference or intervention of a probate or any other court, board or person whomsoever; that thereafter, and prior to the admission of said will to probate, the said will was duly filed in the superior court of the State of Washington, for King county, and upon due proceedings had and due proofs made, was, on the 25th day of November, 1892, by the decree of said superior court, duly admitted to probate, and thereafter, on said 29th day of November, a certificate of the probate thereof was duly issued by the said superior court, under the seal thereof; that thereafter, on the 30th day of November, 1892, the said Edward Von Tobel filed in said superior court an instrument in writing, wherein and whereby the said Von Tobel renounced the executorship under said will and declined and refused to qualify as such ex-
3 ecutor; that thereafter, on said 30th day of November, 1892, the said superior court issued letters to the said Sarah Woodward, as executrix of said last will and testament; that the said Sarah Woodward, on the 29th day of November, 1892, filed in the above entitled superior court her oath as said executrix and ever since thereafter, until the 20th day of September, 1901, acted as the sole executrix of the said last will and testament.

II.

That thereafter, on or about the 20th day of September, 1901, said Sarah Woodward resigned her letters as said executrix, and John H. McGraw was by order of the above entitled court in said cause, duly entered, regularly and lawfully appointed as administrator with the will annexed of the estate of said Henry S. Woodward deceased, and he thereupon qualifies as said administrator, and has since acted and now acts as such, and said plaintiff, John H. McGraw, as said administrator, was heretofore to-wit, on the 25th day of September, 1901, duly substituted in the above entitled action, by order of the above entitled court duly entered as one of the plaintiffs herein.

III.

That the plaintiff, Sarah Woodward, is and was during all the times hereinafter mentioned, a non-resident of the State of Washing-

ton, her residence being during all of said time in the county of Santa Clara, State of California.

IV.

That for a long time previous to, and at the time of, the death of said Henry S. Woodward, as aforesaid, he was, together with the plaintiff, Sarah Woodward, the owner in fee simple, as community property, of all that certain piece or parcel of land situate in the city of Seattle, State of Washington, particularly described as follows: Lot eight (8) in block eleven (11), of Maynard's plat of the town (now city) of Seattle, as the same appears of record in the office of the auditor of King county said State; and said property, at the time of the decease of said Henry S. Woodward, as aforesaid, and during all the times hereinafter mentioned, contained and now contains large and valuable improvements, and was and is capable,
of producing and did produce and now produces, large
4 revenues in the way of rents and profits, and was and is of considerable value therefore.

V.

That plaintiffs are now, and during all the times hereinafter complained of, were the lawful owners and holders of the title in fee simple to said premises, and entitled to the possession thereof, and that the defendants, claim some interest, right or title in or to said premises, under and by virtue of a certain pretended tax deed made to the defendant, H. C. Taylor, on or about the 13th day of February 1897, which said Taylor claims to hold for the benefit of himself and the other defendants, but plaintiffs allege that said pretended deed, is wholly invalid and void, and ineffective to convey any right, or title in said premises to said defendants, or either of them, for the following reasons, to-wit: That the pretended assessment sale, assignment, tax certificate, notice of application for deed, notice of expiration of period of redemption, and the said deed, and all and every proceeding relating to the same, or any part thereof, was, were, and are wholly illegal, contrary to law, fraudulent and void, upon the following grounds, to-wit:

1. That the assessment rolls for said county for said year 1891, consisted of 15 volumes numbered from 1 to 15; that all the entries of any kind whatsoever relative to the assessment of said premises for taxation were contained in volume 11 of said rolls, and not elsewhere; that the pretended assessment and listing for taxation of the said described premises, was wholly incomplete, insufficient irregular, contrary to law, and without any notice whatsoever to the owners of said premises, to-wit, the plaintiffs herein; that the assessor of said King county failed and neglected to make out in the said assessment rolls, or at all, a list showing the names of the owners of said premises, to-wit, the plaintiff Sarah Woodward and said Henry S. Woodward, deceased, or that the names of said owners were unknown to said

assessor; but said assessor did, as these plaintiffs have since learned, make certain entries (together with others) in volume 11 of said rolls at page 2481, as follows:

No. of line.	Name of owner.	No. of lot.	No. of blk.	Name of plat.
10	C. Winehill.	8	11	Maynard's plat.

5 that no other entries whatsoever relating to the name of the owners of said premises were made at any other place in said book, or in any other book or books of said roll; and plaintiffs allege that no person by the name of C. Winehill, was ever the owner of said premises, or any part thereof, when said assessment was attempted to be so levied, or at any other time, and that no person by the name of C. Winehill ever claimed to have any interest whatsoever in said premises at said time, or at any other time; but that said premises were owned at said time by said Henry S. Woodward, afterwards deceased as aforesaid, and the plaintiff, Sarah Woodward, as their community property as aforesaid, and that said ownership was a matter of public record in the office of the auditor of said King county.

2. That the said assessor failed and neglected to make return to the county auditor of said county of said assessment rolls, including said Book No. 11, in the manner or within the time required by law, or at all, or to attach to said Book No. 11, or any other book of said rolls, an affidavit as required by law, or any affidavit at all, except that he affixed to volume 15 of said rolls, a pretended affidavit, in words and figures as follows, to-wit:

STATE OF WASHINGTON, }
County of King, } ss:

I, Frank Paul, assessor of King county, do solemnly swear that the books vol. 1 to 15 inclusive, including pages from 1 to 3496 to which this is attached, contains a correct and full list of all the real property subject to taxation in King county, so far as I have been able to ascertain the same; and that the assessed value set down in the proper column, opposite the several kinds and descriptions of property is in each case a fair value of such property, to the best of my knowledge and belief, and that the footings of the several columns in said books, and the tabular statements returned herewith are correct as I verily believe.

FRANK PAUL, Assessor.

Subscribed and sworn to before me this 31st day of July, 1891.
[AUDITOR'S SEAL.]
F. A. TWICHELL,
Auditor of King County.

6 3. That said county auditor failed and neglected to make or enter in each of said tax books or lists a certificate within the time or in the manner required by law, or at all, certifying that

said rolls contained a correct list, or any list, of all real and personal property in the said county of King, subject to taxation; that the only certificate, or pretended certificate of said auditor affixed to said volume 11 was entered on page 2894, thereof, and was in words and figures as follows, to-wi;

I, F. A. Twichell, auditor of King county, State of Washington, do hereby certify that the following is a correct list of taxes levied on the real property in the county of King for the year one thousand eight hundred and ninety-one.

Witness my hand and seal this 30th day of November, 1891.

[AUDITOR'S SEAL.] F. A. TWICHELL,
County Auditor.

4. That said county auditor failed and neglected to deliver said assessment rolls to said county treasurer within the time or in the manner required by law, or at all, with his warrant thereto attached authorizing the collection of taxes, or with any warrant thereto attached except that a pretended delivery of said books by said county auditor to said treasurer was made on the 9th day of December 1891, and a pretended warrant was thereto affixed to volume 15, and no other volume of said rolls, as follows, to-wit:

STATE OF WASHINGTON, } ss:
County of King, }

The State of Washington to Byron Phelps, county treasurer of King county, State of Washington, Greeting:

In the name of the State of Washington you are hereby commanded to collect the taxes charged in the real property assessment roll of said King county being volumes 1 to 15 inclusive for the year one thousand eight hundred and ninety-one, as required by law.

Witness my hand and official seal of office this 9th day of November, A. D. 1891.

[AUDITOR'S SEAL.] F. A. TWICHELL,
County Auditor of King County, Washington.

7 5. That said county treasurer failed and neglected to transcribe into a book known as the "Tax Judgment Sale, Redemption, and Forfeiture Record," a description of the said described premises showing the name of the owners of said land, to-wit, plaintiff Sarah Woodward and said Henry S. Woodward, deceased; but on the contrary, he pretended to transcribe said lands on such record showing that the same were owned by another person, to-wit, one C. Winchill, who was not during any of said time the owner of said premises, nor any part thereof, nor any interest therein; and he did enter therein the name of said C. Winchill, as the name of the person to whom said premises had been assessed, when in truth and in fact said premises were not assessed or pretended to be as-

sessed in the name of C. Winchill; that said pretended transcript was in words and figures as follows, to-wit:

No. of line.	Name of owner.	No. of lot.	No. of blk.	Name of plat.
23	C. Winchill.	8	11	Maynard's plat.

6. That a pretended sale of said premises, for delinquent taxes, was held by said treasurer on the 7th day of June, 1894; and said premises were pretended to be sold and forfeited at said time to said King county, for the sum of $412.65, as taxes alleged to be due thereon, $41.27; as penalty, and $199.75 as interest, making a total of $653.70; and thereafter, on or about the 6th day of February, 1895, said treasurer pretended to issue a certificate of purchase to said defendant, H. C. Taylor, but plaintiffs allege that said pretended certificate of purchase failed to describe the said premises as the property of plaintiff Sarah Woodward and Henry S. Woodward, deceased, and failed to describe said premises as the property of any person whomsoever; and further, that said pretended certificate of purchase was not executed by the treasurer of said King county under his hand and seal as required by law, or at all. Said pretended certificate is in words and figures as follows to-wit:

$740.86. (Issued under Section 134, Revenue Act 1893.) No. 260.

Certificate of Purchase of Real Estate Sold and Forfeited to the County of King.

STATE OF WASHINGTON, } ss:
County of King, }

8 In the name of the State of Washington,

I, A. P. Mitten, treasurer of King county, in said State, do hereby certify that at a sale of real estate held at the front door of the court house in said county, (of which notice was duly and regularly given,) on the fifteenth day of June, 1894, pursuant to the order and judgment of the superior court of said King county, Washington, duly made and entered in the "Tax Judgment Sale Redemption and Forfeiture Record" in said court, on the 14th day of May, 1894, in proceedings regularly and duly had therein, on application of the undersigned as treasurer of said county for judgment for sale of the delinquent lots and lands in said application described, for the delinquent taxes for the year 1891, together with the interest, penalties and costs due thereon the following described lots, pieces, tracts and parcels of land, situated in said county to-wit: lot 8, block 11 Maynard's plat were, on the fifteenth day of June, 1894, between the hours of 10 o'clock a. m. and 3 o'clock p. m. offered for sale, whereupon, there being no bidders therefor, the same were sold and forfeited to said county of King for the amount of the taxes, assessments, interest, penalties and costs due thereon, to-wit: four hundred and twelve 65/100 dollars taxes, forty-one 27/100 dollars penalty,

one hundred ninety-nine 73/100 dollars interest and five cents (.05) costs making a total of six hundred fifty-three 70/100 dollars due thereon, as aforesaid, the same being the amount for which said land was sold and forfeited to said county.

And whereas: H. C. Taylor, of Seattle, Wash., has applied to the undersigned, as county treasurer of said county, to purchase the above described land, and has paid to such treasurer the sum of seven hundred and forty 86/100 dollars, the same being the total amount due upon said land and for which the same was sold and forfeited to the county of King as aforesaid, together with the penalties, interests and costs on all taxes heretofore forfeited.

Now therefore, in consideration of the premises aforesaid, the said county of King does remise, release, and set over unto the said H. C. Taylor, all of its right, title and interest of in and to the said described real estate, and each and every part thereof; pro-
9 vided, however that said property is sold subject to redemption according to law in such cases made and provided. And the holder of this certificate will be entitled to a deed from the treasurer of said county, for said real estate at any time after the expiration of two years from the date of said sale, if the same be not redeemed within said time.

I further certify that the holder of this certificate must take out a deed for said land and file the same for record within one year from and after the time he is entitled to such deed, otherwise this certificate, and any deed he may receive thereon, and the sale on which this certificate is based, will be null and void; provided, however, that if the holder of this certificate shall be prevented from obtaining such deed by an injunction or order of any court, or by the refusal of the treasurer to execute the same, that the time he is so prevented shall be excluded from the computation of such time.

Witness my hand and official seal this the sixth day of February, 1895.

A. P. MITTEN,
Treasurer of King County, Washington,
By JOHN RIPLINGER, Deputy.

7. That the defendant, H. C. Taylor, failed and neglected to publish or give notice in the manner required by law, or at all, to the owners of said premises of his intention to apply for a deed to said premises under and by virtue of said alleged tax sale; and said Taylor, well knowing that plaintiff Sarah Woodward and said Henry S. Woodward, deceased, were the owners of said premises as aforesaid, failed and neglected before the expiration of the time of redemption from the pretended sale aforesaid, or at all, to serve or cause to be served a written or printed, or partly written and partly printed notice of such purchase on the person in whose name the same was assessed, or on the plaintiff Sarah Woodward and said Henry S. Woodward deceased, as the owners of said premises as aforesaid, or any person or persons inter-

ested in said premises, stating the date when the period of redemption would expire, and failed and neglected to make diligent
10 or any search or inquiry for the person in whose name said premises were pretended to be assessed, or for the said owners or for any other person claiming to be the owner or person interested in said premises; but the only notice or pretended notice given by any person or persons whomsoever as to the expiration of the period of redemption from any sale of said premises, or the pretended sale thereof as aforesaid, was published in the Seattle Argus, and was in words and figures as follows to-wit:

NOTICE.—To C. Winchell, the person in whose name was taxed Gustave Winehill, and Mattie Ford, the owners of the lot hereinafter described and all persons interested therein: You and each of you are hereby notified that the following described real estate situate in the county of King, and State of Washington, to-wit, lot eight (8) in block eleven (11) as shown on Maynard's plat of the town (now city) of Seattle, of record in the office of the auditor of said King county was offered for sale for the county and State taxes of 1891, on the 15th day of June, 1894, and no bidder appearing therefore, the same was on said day duly sold and forfeited to the county of King in the State of Washington. That thereafter on the 6th day of February, 1895, H. C. Taylor of the city of Seattle, county of King, and State of Washington, applied to the county treasurer of said county of King to purchase the above described land, and paid to such county treasurer the sum, seven hundred and forty and 86/100 dollars, the same being the total amount due upon said land, and for which the same was sold and forfeited to the county of King as aforesaid, together with all penalties, interest, and costs thereon; that thereupon a receipt therefor and certificate of purchase of said lot issued from the county of King, under the hand of the treasurer of said county to said H. C. Taylor for the above-described real estate, and said H. C. Taylor is now the owner and holder of said receipt and certificate; that said lot was taxed in the name of C. Winchill; that said lot was taxed for the year 1891; that the time of redemption will expire on the 6th day of February, 1897, after which date application will be made for a deed to said property as provided by law.

H. C. TAYLOR,
BRINKER, JONES & RICHARDS,
Attorneys for Certificate Holders.

11 8. That said Taylor failed and neglected by himself or any agent to make or deliver to said county treasurer any affidavit of having complied with the conditions required by law, entitling him to demand and receive a deed to said premiies, or any affidavit showing diligent or any search for these plaintiffs as the owners and persons interested in said described premises; but plaintiffs allege that said Taylor and his agents well knew the said owners

to be the plaintiff Sarah Woodard and said Henry S. Woodward, deceased, and none others; and that he and they well knew the address of the said Sarah Woodward, and of the executrix of said estate, at said time; and that he wholly failed and neglected to give them or either of them any notice whatsoever of his intention to apply for the issuance of a tax deed to said premises; that the only affidavit, or pretended affidavit, of any person, concerning the intention to apply for any deed as aforesaid, was in words and figures as follows, to-wit:

STATE OF WASHINGTON, } ss.:
County of King, }

J. W. McConnaughey, being first duly sworn, on oath deposes and says: that he is the agent of H. C. Taylor, the person whose name is subscribed to the notice of application for tax deed a copy of which is hereto attached; that he has made careful and diligent search and inquiry for the person in whose name the lot in said notice described was taxed, and find the same to have been taxed to C. Winchell and for the owners of and persons interested in said lot, viz: Gustave Winehill and Mattie Ford, who are named in said notice and to whom said notice is addressed, and that said persons cannot be found in said King county, State of Washington; that he published the original notice, of which the attached is a true copy in the Argus, a newspaper of general circulation in said county of King, in which the land in said notice described is situated; that said notice was inserted three times in three regular and separate editions of said newspaper, the date of the first insertion and publication being on the 2nd. day of January, 1897; the date of the second insertion and publication being on the 9th day of January, 1897, and the date of the last publication being on the 16th day of January, 1897;
12 the first publication being not more than three months and the last not more than one month prior to the date of the expiration of the time of redemption of said property from tax sale.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11th day of February, 1897.

R. S. JONES,
Notary Public in and for the State of Washington, residing at Seattle, Wash.

That there was affixed to said affidavit a printed copy of the notice set forth in subdivision 7 of this paragraph.

9. That said H. C. Taylor did not by himself or any agent, previous to the said application for a tax deed, pay or cause to be paid, all the taxes subsequently assessed upon said premises for the various years subsequent to the year 1891, but he neglected to pay,

or cause to be paid, the taxes so levied upon said premises for the years 1894, 1895 and 1896, and that he was thereby deprived of any right he may have previously had to demand and receive a deed to said premises by virtue of any of the proceedings hereinbefore referred to, or otherwise.

10. That by virtue of all the matters and things hereinbefore set forth, the said H. C. Taylor, and all persons interested with him as aforesaid was deprived of the right to demand and receive a deed to said premises from the said treasurer; but that nevertheless, a pretended tax deed was, on or about the 13th day of February, 1897, issued to said Taylor as aforesaid; but said pretended tax deed was not signed and executed by the county treasurer of said King county under his hand and seal, or at all; and said deed failed to describe in intelligible language, or in such language as could be readily understood from an inspection thereof, the particular tax or taxes for which said deed purported to be executed, and failed to state that said premises had been sold to pay said taxes, and that the same had not been redeemed from said sale as required by law or at all; and failed to state that said premises were subject to any redemption provided by law; and failed to state that the same was taken out within one year from the time that the grantee was entitled to the same that said pretended deed was and is in words and fig-

13 ures as follows, to-wit:

STATE OF WASHINGTON, } ss.:
County of King, }

Whereas, at a public sale of real estate for the non-payment of taxes, penalties, interests and costs held in the county aforesaid, on the 15th day of June, 1894, the following described real estate was offered for sale for 1891 taxes, to-wit, lot eight (8) block eleven (11), Maynard's plat of the town (now city) of Seattle, as shown on the recorded plat, whereupon there being no bidders therefor, the same was forfeited to the said county of King; and, whereas, on the 6th day of February, 1895, the said real estate was sold by the county treasurer of said county in strict compliance with the provisions of section 54, of chapter 124, Session Laws of the State of Washington of 1893; and whereas, the same not having been redeemed from sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the State of Washington, necessary to entitle him to a deed for said real estate:

Now therefore, know ye, that I, Charles F. Whittlesey, county treasurer of said county of King, in consideration of the premises, and by virtue of the statutes of the State of Washington in such cases provided, do hereby grant and convey unto H. C. Taylor, his heirs and assignees forever, the real estate hereinbefore described.

Given under my hand and seal of office this 13th day of February, A. D. 1897.

[King Co. Treasurer's Seal.]

CHARLES F. WHITTLESEY,
County Treasurer of King County, Washington.
P. P. PADDEN.

11. That all the proceedings in this paragraph hereinbefore enumerated, was and were in violation of article V, and the first section of article XV of the amendments to the Constitution of the United States and of section 11 of article 1, of the constitution of the State of Washington, in this: That they constituted an attempt to deprive plaintiffs of their property without due process of law.

14 VI.

That heretofore on the first day of March, 1901, at the hour of 10:30 o'clock a. m. of said day at his office, No. 819 Second avenue in the city of Seattle, State of Washington, and before the beginning of this action, plaintiff tendered in gold coin of the United States, to the defendant, H. C. Taylor, for himself and as agent for J. W. McConnaughey, D. F. McConnaughey, and any and all persons having or claiming any interest with him under and by virtue of any of the proceedings hereinbefore set forth, all taxes, penalties, interest and costs paid by said Taylor at said pretended tax sale, or by any of his assignees or grantees, or subsequently paid by them, or either of them as taxes, penalties and interest on said premises, amounting to the total sum of nine thousand four hundred and thirteen and eighty one hundredths dollars ($9413.80), as follows, to-wit:

Taxes for y'r.	Am't p'd.	Date of pay't.	Rate of int.	Am't tendered.
1890	$732.95	Feb. 26, '95	20 %	$1564.72
1891	740.86	Feb. 6, '95	20 %	1639.89
1892	458.09	M'ch 26, '96	12 %	728.95
1893	691.20	June 26, '95	12 %	1161.81
1894 & 1895	1718.95	Oct. 31, '99	15 %	2062.74
1896	208.04	June 8, '97	15 %	464.92
1896	298.03	Nov. 30, '97	15 %	443.29
1897	423.36	May 31, '98	15 %	597.96
1898	194.40	May 29, '99	15 %	245.38
1898	194.40	Nov. 29, '99	15 %	236.85
1899	237.60	May 31, '00	15 %	267.30
Total				$9413.80

And said tender, and each and every part thereof, was refused; that said Taylor made no objection at said time to the amount or manner of said tender in any respect whatever, but declined the

same and each and every part thereof absolutely; that said Taylor admitted at said time that he was the owner jointly with the defendants D. F. McConnaughery and J. W. McConnaughey of the claim of title under the said pretended tax proceedings hereinbefore referred to, and that he was the agent for the said McConnaugheys under said claim.

And thereafter, on the same day, at the hour of 12,30 o'clock p. m. the plaintiffs caused to be tendered to the county treasurer of said county of King, *the sum of two hundred sixty four and eighty five* one-hundredths dollars ($264.85), on account of taxes justly due and remaining unpaid on said premises for the year 1899; and thereupon said county treasurer issued a temporary receipt to the
15 person by whom said tender was made on behalf of these plaintiffs accepting said tender; that thereafter, to-wit, on the 8th day of March, 1901, the said treasurer returned said sum to the person making said tender on behalf of these plaintiffs and declined to issue a final receipt therefor.

And plaintiffs aver that they are willing and ready to pay the defendant said sum or sums, and any and all sums which may be found to have been lawfully paid by said defendants, on account of any tax lawfully levied upon said premises.

Second Cause of Action.

And for a second cause of action and complaint plaintiffs allege as follows, to-wit:

I.

Plaintiffs allege and reaffirm all the allegations, matters and things set forth in the first cause of action of this complaint, and the same, and each and every part thereof, is made a part of this cause of action, in all respects as therein stated, as fully as if the same were here reiterated.

II.

That under and by virtue of the terms of the said will of said Henry S. Woodward, deceased, the plaintiff, Sarah Woodward, was to receive during her natural lifetime all of the rents, issues and profits of the entire estate of said deceased, of whatsoever nature, to be and become her property absolutely, for her support, maintenance and comfort; and should such rents, issues and profits prove inadequate for her support maintenance and comfort, then and in such case said Sarah Woodward and Edward Von Tobel, as executors of the last will and testament of Henry S. Woodward, deceased, were at once empowered under the terms of said will, to appropriate and set apart such properties or assets of said estate as they should deem necessary for the support, maintenance and comfort of the plaintiff Sarah Woodward, the same to be and become the property of said

Sarah Woodward, absolutely for her own exclusive use and benefit; the entire purpose, intent and object of said will being to prov-e the plaintiff Sarah Woodward with such complete and ample
16 support and maintenance as said estate should be capable of, during her lifetime; and the said executors Sarah Woodward and Edward Von Tobel were empowered to do any and all things in and about said estate necessary, convenient and proper, and as they should deem fit, for the carrying out of said purpose, intent and object; and for a more convenient and specific statement of the purpose and intent of said will, a copy thereof is attached to this complaint as Exhibit "A" and made a part hereof.

III.

That said premises contained extensive improvements and during all the times herein mentioned were capable of producing and did produce large revenues, in the way of rents and profits; that owing to the absence of plaintiff Sarah Woodward from the State of Washington, it became necessary to have an agent resident at the city of Seattle for the purpose of caring for said premises, collecting the rents and profits thereof, and paying all taxes lawfully levied thereupon; and for such purpose only, during a portion of said period, to-wit, from the 21st day of December, 1895, until the first day of December, 1897, plaintiff Sarah Woodward constituted and appointed one Oscar Knox, as her agent, to represent her as aforesaid, and as such agent said Knox was empowered to collect the rents and profits and to care for said estate, making due, truthful ample and complete returns to her of all his doing- as such agent, and to collect and remit to her, all the rents and profits of said estate, saving only such as were necessary and proper for payment of all taxes at any time lawfully levied against said premises, and for the care and maintenance of such premises; and said Knox was further empowered to advise her as to the condition of said estate from time to time.

IV.

That during the entire period of the agency of said Knox, as aforesaid, said premises were constantly occupied by tenants, and constantly produced a large sum as rents and profits, greatly in excess of the cost of maintenance thereof; and said Knox collected and received as said agent, all the said rents and profits, and made disposition thereof in a manner to these plaintiffs unknown, except that during the period of the said agency of said Knox, pre-
17 vious to the acts herein complained of, he remitted to said Sarah Woodward of said rents and profits, only the sum of fifty-four dollars and eighty-three cents ($54.83); and that contrary to and in violation of the terms of said agency, said Knox failed to pay or cause to be paid any tax or taxes levied upon said premises during the period of said agency, or any tax or taxes previously levied thereon which had become delinquent and during the period

of said agency of the said Knox, no accounting with him was had or could be secured whereby to ascertain the amount of said rents and profits.

V.

That as a result of the negligence and mismanagement of the affairs committed to his care, as aforesaid, by the said Knox, the plaintiff Sarah Woodward, became and was in a state of great distress of mind and body, and was lacking in funds wherewith to procure the necessary comforts and food with which to sustain the ordinary demands of life; and was compelled to avail herself of all means within her power to obtain funds from the said estate of herself and said Henry S. Woodward, deceased, necessary for her maintenance and support; and said plaintiff Sarah Woodward, being then of great age, to-wit, of the age of seventy-seven years, and having the natural infirmities incident thereto, and being also afflicted with severe bodily illness, she became and was incompetent to understand and transact business, and unable to accurately judge of the conditions surrounding said estate; and being a non-resident of said city and State, she was compelled to rely upon the advice of her said agent.

That while plaintiff, Sarah Woodward, was ignorant of the true condition of said premises as aforesaid, and was in said condition of distress and was lacking in means, and while her age and infirmities rendered it impossible for her to earn or obtain means of subsistence otherwise, said Knox, on or about the 12th day of June, 1896, represented to her that one J. W. McConnaughey had purchased the title to said premises under a certain tax sale, for taxes which had been lawfully levied upon said premises for the
18 year 1891, and which had become delinquent, and that she was in danger of losing her entire interest, and the interest of the estate of said Henry S. Woodward, deceased, in said premises under and by virtue thereof; which plaintiffs subsequently ascertained to be the tax sale referred to in the first cause of action; and said Knox further represented that said McConnaughery was threatening to take possession of said premises and *outset* the plaintiffs therefrom, and that in case he should carry out his threat, these plaintiffs would be deprived of all and every right or claim of right they might have in and to said premises; that thereafter, at various times, said Knox informed plaintiff Sarah Woodward, that said McConnaughey was threatening to take possession of said premises; and that he had made various demands for the payment of various sums for an extension of time which he pretended to be able to give within which to redeem said premises from said tax sale.

VII.

That on or about the 10th day of February, 1897, said Knox acting at the instance and request of the defendants, submitted an offer to plaintiff Sarah Woodward from defendants as follows, to-wit, that

the defendants herein would pay the sum of fifteen hundred dollars ($1500) net, and assume all liens or claims or encumbrances of whatsoever nature upon said premises, in consideration of a quit-claim deed to said premises, from said plaintiff: that said offer was in writing and was in words and figures as follows, to-wit:

SEATTLE, WASH., Feb. 10, 1897.

Mrs. Woodward, Saratoga, Cal.:

The tax certificate man will give us $1500 *net* and take care of the lienors so no personal liability will attach to you;

Your friend, O. KNOX.

and said Knox further represented that while said quit-claim deed was necessary to vest in said defendant a complete title to said premises, they would nevertheless pay the said sum therefor, and said Knox further represented that unless said proposition
19 should be accepted, and said quit-claim deed executed, that no sum whatsoever could be obtained from any source whatsoever by the said plaintiff Sarah Woodward, or the estate of said Henry S. Woodward, deceased.

VIII.

That thereafter, to-wit, on the 13th day of February, 1897, the defendants, H. C. Taylor, D. F. McConnaughey and J. W. McConnaughey, acting through their agent, J. W. McConnaughey, well knowing that the said claim of tax title to said premises was wholly insufficient, invalid, void, and ineffective to convey to them any substantial interest in said premises, but still persisting therein, and well knowing the condition of distress of said Sarah Woodward, as aforesaid, and with intent to cast a cloud upon the title to said premises, and with intent to harass and embarrass said plaintiff Sarah Woodward, and thereby force and compel her to give up said premises for a nominal consideration proceeded to and did take wrongful possession of said premises; that said possession was so taken by force, and violently, and not by any proceeding at law; and said McConnaughey acting for himself and the other defendants, informed all persons then occupying said premises and he threatened said persons with expulsion from said premises and with prosecution for debt should they thereafter pay any sum whatsoever on account of rent of said premises, to any person whomsoever other than himself; and plaintiffs allege that the taking possession of said premises at said time and in the manner aforesaid, was contrary to law, and without the consent of these plaintiffs, and was done for the purpose of carrying out the plan of said defendant, J. W. McConnaughey, to defraud and deprive these plaintiffs of said premises and for the purpose of harassing and embarrassing them in the use and enjoyment thereby seeking to obtain the real title to said premises for a nominal sum.

IX.

That thereafter, on or about the 9th day of March, 1897, said Knox, acting at the instance and request of the defendants, and under their direction, forwarded to plaintiff Sarah Woodward, through one A. S. Kittredge, her attorney at the city of San
20 Jose, California, a paper writing purporting to be a quit-claim deed to said premises, for the expressed consideration of fifteen hundred dollars ($1500) made in the name of the defendant D. F. McConnaughey as grantee; and said Knox advised said plaintiff that immediately upon the return of said deed, the defendant would pay the whole amount of the said sum of fifteen hundred dollars ($1500), without any deductions whatsoever, which said sum would be immediately paid to said plaintiff for her own use; and that the said defendants would assume all liability whatsoever attaching to said premises; that accompanying said deed was a proposition in writing, made at the instance and request of the defendants, said writing being in words and figures substantially as follows, to-wit:

SEATTLE, WASH., M'ch 9, 1897.

A. S. Kittredge, San Jose.

DEAR SIR: I enclose you to-day quit-claim deed to property herein described: Please have Mrs. Woodward sign with as little delay as possible: *As soon as deed is returned the $1500 will be paid over to me and passed to Mrs. W.'s cr. in bank. Assure Mrs. W. the matter will be settled so no personal liability will attach to her.*

Very truly, O. KNOX.

And believing that the said proposition and offer would be carried out in good faith, and believing that her title and the title of the said estate to said premises was nominal only, and that the real title thereto had already passed to the defendants, and being in great mental distress on account of her necessitous condition, ill in health, and great age, and being persuaded and induced thereto by the representations and statements aforesaid, the plaintiff Sarah Woodward for herself and acting as sole executrix of said estate, returned said deed to her said agent to be delivered to the said McConnaughey upon the immediate payment of the sum of fifteen hundred dollars ($1500) net, and the assumption of all liens and claims against said premises of whatsoever kind.

X.

That the agency conferred upon the said Knox for the purpose of receiving and delivering said quit-claim deed, was an ex-
21 press agency, and said Knox was expressly limited and authorized to deliver said deed only upon the condition of the immediate payment to him of the said sum of fifteen hundred dollars ($1500), without any deduction whatsoever for any purpose

whatsoever, and in addition thereto, the assumption by the grantee of all liens or claims whatsoever upon said premises; that at no time thereafter did said Sarah Woodward, either in her individual or assumed capacity as sole executrix of said estate, change or modify the agency of said Knox; but that, contrary to the terms of said agency, and without any authority whatsoever, the said Knox did on the 21st day of June, 1897, deliver said deed to said McConnaughey for a sum much less than the sum of fifteen hundred dollars ($1500), to-wit the sum of three hundred and fifty dollars ($350).

XI.

That at the time when the said offer was made and accepted, said premises were reasonably worth the sum of forty thousand dollars ($40,000), and were capable of producing and did produce a large revenue in the way of rents and profits, the exact amount thereof being to plaintiffs at this time unknown, but amounting, as plaintiffs are informed and believe to the sum of four hundred dollars ($400) per month; but owing to the absence of said Sarah Woodward from the State of Washington and of her inability to obtain other information, and of her confidence and reliance in and upon the said Knox, she was ignorant of the true value and producing capacity of said premises at said time; but she believed the representations made to her as to the value thereof, and believed that she and the estate for which she was acting, had wholly lost all interest in said premises, and that the real title thereto had already vested in the defendants; that she did not discover any of said facts until on or about the 1st day of December, 1899.

XII.

Plaintiffs allege that the defendants acting through their said agent J. W. McConnaughey, combined to defraud these plaintiffs of said premises and did intentionally mislead the said Sarah Woodward through her said agent to believe that the title to said
22 premises had been irrevocably lost; and that only a nominal title remained outstanding; and that the value of said premises was very much less than the actual value thereof, to-wit, thirty-eight thousand five hundred dollars ($38,500), less than the value thereof; and plaintiffs allege that said defendants well knew the value of said premises at said time, and well knew that they were defrauding these plaintiffs of said premises, and that they did not then believe, nor do they now believe that said tax deed was irrevocable and that the title to said premises had been totally lost to plaintiffs, on account thereof; and plaintiffs allege that said J. W. McConnaughey has boasted of his success in having defrauded these plaintiffs of said premises, and has shown in many ways that he was fully cognizant of the great fraud which he committed against these plaintiffs; and that he well knew and well knows that without the

said quit-claim deed, his title to said premises and the title of his assigns thereto would be absolutely valueless.

XIII.

That the said quit-claim deed was made in the name of the defendant, D. F. McConnaughey, for the benefit of himself, and as trustee for said H. C. Taylor and J. W. McConnaughey, and thereafter, the said D. F. McConnaughey conveyed said premises to the defendant, C. K. McConnaughey; that said defendant, C. K. McConnaughey, was not a purchaser of said premises for a valuable consideration, or any consideration at all, but that he is and was acting solely as a trustee, under said conveyance for said defendants, H. C. Taylor and wife, J. W. McConnaughey, and D. F. McConnaughey.

XIV.

That heretofore, to-wit, on the 1st day of March, 1901, at the hour of 10:30 o'clock a. m. of said day, at his office, No. 819 Second avenue, in the city of Seattle, State of Washington, before the beginning of this action, plaintiffs, not admitting, however, the right of defendants thereto, tendered in gold coin of the United States, to the defendant, H. C. Taylor, for himself, and as agent for J. W. McConnaughery, and D. F. McConnaughey, and any and all persons having or claiming any interest with him under and by virtue of the said quit-claim deed, the sum of seven hundred dollars, ($700),
23 with interest thereon from the 22d day of April, 1897, at the rate of 7 per cent. per annum, and also the sum of eight hundred dollars ($800), with interest thereon, from the 22nd day of May, 1897, at said rate; the said sum being the various amounts which the said defendants claim to have paid to the said Oscar Knox, as the agent of plaintiffs, on account of said quit-claim deed; and said tender, and each and every part was refused; that said Taylor made no objection at said time to the amount or manner of said tender in any respect whatever, but declined the same, and each and every part thereof, absolutely; that said Taylor admitted at said time, that he was the owner jointly with the defendants D. F. McConnaughey and J. W. Connaughey of the claim of title under the said quit-claim deed, and that he was the agent for the said McConnaugheys, under said claim and plaintiffs aver that they are ready and willing to repay to said defendants all, or any sum or sums paid by said defendants, or which it may appear said defendants are in equity entitled to receive from these plaintiffs on account of any payments made by them to said Knox or otherwise, on account of said quit-claim deed.

Third Cause of Action.

And for a third cause of action, and complaint, plaintiffs allege as follows, to-wit:

I.

Plaintiffs allege and reaffirm all the allegations, matters and things set forth in the first and second cause- of action of this complaint, and the same and each and every part thereof is made a part of this cause of action in all respects as therein set out, as fully as if the same were here reiterated and set forth.

II.

That at the time of the making of said quit-claim deed, a certain action for the foreclosure of certain mechanics' liens upon said premises, was pending in the above entitled court, wherein one A. S. Kerry, was plaintiff and Gustave Winehill and others including plauntiff Sarah Woodward in her personal capacity, and also as representing said estate, were defendants; that said cause was numbered 19,807 among the records of the
24 clerk of said court; and on or about the 29th day of April, 1897, after the making of said quit-claim deed but before the same was delivered to the defendants, judgment was rendered in favor of said Kerry, for the sum of five hundred and twenty-three and ninety-four one-hundredths dollars ($523.94), and said judgment for said sum thereupon became a lien upon the said described premises, as provided by the laws of the State of Washington, in such cases. But plaintiffs allege that whatever liability attached to said Sarah Woodward, or to said estate, or to said premises, on account of said judgment or of the claims upon which the same was based, was assumed by the defendants as a part of the consideration for the making of said deed; and that contrary to said agreement and in violation thereof, said defendants did not pay said judgment, or any part thereof, but they allowed the same to remain as a lien on said premises, and to stand as a liability against said Sarah Woodward and said estate for a long time thereafter to-wit, until the 5th day of April 1899.

III.

That on or about the 2nd day of April, 1898, the defendants herein by and through the defendant, J. W. McConnaughey, paid to said Kerry, and his wife, the sum of five hundred dollars ($500), in gold coin, in consideration of which, said Kerry and wife, at the request of said McConnaughey, made an assignment of said judgment in writing, to one Isabel C. Jones; but plaintiffs allege that in truth and in fact, the said Isabel C. Jones was not a purchaser of said judgment in her own behalf, or at all; and that the consideration of said assignment was not paid by her, but that said assignment

was in reality taken in the name of said Isabel C. Jones as a trustee for the defend-nts herein; and plaintiffs further allege that the money so paid to said Kerry and wife, belonged to these plaintiffs, and that the same constituted a part of the fifteen hundred dollars ($1500) agreed to be paid by said defendants in consideration of the quit-claim deed hereinbefore referred to; but which said defendant wrongfully withheld from plaintiffs, and thereafter, wrongfully applied to purchase said judgment.

IV.

That on or about the 24th day of February, 1898, a writ of execution was issued on said judgment and delivered to the sheriff of said county of King; and said sheriff thereupon gave due notice of a sale of said premises under said execution; and thereafter, on or about the 9th day of April, 1898, the defendants caused said premises to be bid in, at said execution sale, in the name of said Isabel C. Jones, for the nominal sum of five hundred dollars ($500); but plaintiffs allege that the said Isabel C. Jones was not a purchaser of said premises at said execution sale, for a valuable consideration at all, but that said premises were so bid in, in the name of said Jones as a pretended trustee for the defendants herein; and that the said Jones took and held the legal title to said premises for such purpose only; and plaintiffs further allege that no actual consideration passed at said time from said Jones or from any of the defendants, but that a pretended credit of said sum of five hundred dollars ($500) was made upon said judgment, upon the return of said sheriff; the sole and only actual consideration at any time, passing from any person to the judgment creditor, being the said sum of five hundred dollars ($500) originally paid by said J. W. McConnaughey to said Kerry and wife out of funds belonging to these plaintiffs.

V.

That thereafter, to-wit, on the 13th day of December, 1898, said Isabel C. Jones, by an instrument in writing duly assigned all her interests in said judgment, and in said premises, under and by virtue of said execution sale, to the defendant, D. F. McConnaughey.

VI.

That thereafter, on the 24th day of April, 1899, the defendant, J. W. McConnaughey, assuming to act for himself, and as agent for the other defendants herein, applied to the sheriff of King county for a deed to said premises under said execution sale; and said sheriff thereupon issued a deed to said defendant, D. F. McConnaughey, purporting to convey said premises to him, under and by virtue of the proceedings under said writ of execution; and said deed was filed for record on the 23rd day of March, 1900, and was recorded at page 217 of volume 238 of Deed Records in the office of the auditor of said King county.

VII.

That at all the times in this cause of action mentioned, plaintiffs had no knowledge of the facts hereinbefore alleged as to the true character of the claim of defendants, under said pretended tax proceedings, and of the misrepresentations, fraud, collusive conduct, and other acts by which plaintiffs were induced to make said quit-claim deed; and plaintiffs were advised and believed that they had lost their title to said premises, and that the defendants had assumed all and every lien, claim, or other liability against said premises; including said judgment and that plaintiffs were freed from all and every personal liability on account thereof and plaintiffs did not come to the knowledge of any of the facts regarding said judgment, assignment, execution sale, and wrongful appropriation of said moneys, until on or about the 15th day of April, 1900.

VIII.

That by virtue of all the matters and things in this cause of action set forth, the defendant D. F. McConnaughey, became and is, a trustee for these plaintiffs under said judgment, and the assignment, thereof, and under the sheriff's sale, and sheriff's deed, made and issued thereunder, and whatever rights in said premises, if any he have therein and thereunder, are wholly in trust for these plaintiffs; and heretofore, before the beginning of this action, plaintiffs demanded of said McConnaughey that he perform said trust and convey to plaintiffs all the right, title, or interest, which he possesses or claims for himself and the other defendants under the said judgment, assignment, sale and deed, and that said demand was refused.

IX.

That heretofore, to-wit, on the first day of March, 1901, at the hour of 10:30 o'clock a. m., of said day, at his office number 819 Second avenue, in the city of Seattle, State of Washington, and before the beginning of this action, plaintiffs, not admitting the right of defendants thereto, tendered in gold coin of the United States to the
27 defendant H. C. Taylor, for himself and as agent for J. W. McConnaughey, C. K. McConnaughey and any and all persons having or claiming any interest with him under and by virtue of any of the proceedings in this cause of action set forth, the sum of five hundred dollars ($500), with interest thereon at the rate of 7 per cent. per annum from the 13th day of December, 1898; and said tender, and each and every part thereof, was refused; that said Taylor made no objection at said time to the amount or manner of said tender in any respect whatever, but declined the same and each and every part thereof absolutely; that said Taylor admitted at said time, that he was the owner jointly with the defendants, D. F. McConnaughey and J. W. McConnaughey of the claim of title to said premises, under the proceedings in this cause of action set forth; and

plaintiffs aver that they are willing and ready to pay the said defendants the said sum of five hundred dollars ($500), with interest thereon from the 13th day of December, 1898, together with any and all sums which may be found to have been justly paid by said defendants on account of any of the proceedings in this cause of action set forth.

Fourth Cause of Action.

And for a fourth cause of action and complaint plaintiffs allege as follows, to-wit:

I.

That plaintiffs are the owners in fee simple of the following described premises, to-wit: Lot eight (8), in block eleven (11) of D. C. Maynard's plat of the town (now city) of Seattle, in the county of King, said State.

II.

That Henry S. Woodward died testate on the 18th day of September, 1892, leaving as his last will and testament an instrument in writing, wherein and whereby the plaintiff, Sarah Woodward and one Edward Von Tobel were nominated and appointed as the executors thereof; that in and by the terms of said will, Sarah Woodward was made the sole heir during her life time of the said Henry S. Woodward, and it was provided therein that the said executors
28 should proceed to settle and close up all the business and affairs of said estate and to execute said last will and testament in the manner provided therein, without bonds, and that letters testamentary should not be required, and without the interference or intervention of a probate or any other court, board, or person whomsoever; that thereafter, and prior to the admission of said will to probate, the said will was duly filed in the superior court of the State of Washington, for King county, and upon due proceedings had and due proofs made was, on the 25th day of November, 1892, by the decree of said superior court, duly admitted to probate, and thereafter on said 29th day of November a certificate of the probate thereof was duly issued by the said superior court, under the seal thereof; that thereafter, on the 30th day of November, 1892, the said Edward Von Tobel filed in said superior court, an instrument in writing, wherein and whereby the said Von Tobel renounced the executorship under said will and declined and refused to qualify as such executor; that thereafter, on said 30th day of November, 1892, the said superior court issued letters to the said Sarah Woodward, as executrix of said last will and testament; that the said Sarah Woodward, on the 29th day of November, 1892, filed in the above entitled superior court her oath as said executrix and ever since, until the 20th day of September, 1901, has acted as the sole executrix of the said last will and testament.

III.

That thereafter, on or about the 20th day of September, 1901, said Sarah Woodward resigned her letters as said executrix, and John H. McGraw was by order of the above entitled court in said cause, duly entered, regularly and lawfully appointed as administrator with the will annexed, of the estate of said Henry S. Woodward, deceased, and he thereupon qualified as said administrator, and has since acted and now acts as such; and said plaintiff, John H. McGraw as said administrator, was heretofore, to-wit: on the 25th day of September, 1901, duly substituted in the above entitled action, by order of the above entitled court duly entered as one of the plaintiffs herein.

IV.

That at the time of the decease of said Henry S. Woodward
29 as aforesaid, he was the owner of his community interest in said described premises, and at his decease, under and by virtue of the terms of said will, all of the interest of said Henry S. Woodward passed to the plaintiff, Sarah Woodward, as sole heir during her lifetime.

V.

That the defendants claim some right, title, or interest in or to said premises under and by virtue of a certain paper writing recorded at page 438, of volume 204, of Deed Records, in the office of the auditor of King county, Washington, which said paper writing is in words and figures as follows, to-wit:

This indenture, made this 8th day of March, in the year of our Lord one thousand eight hundred and ninety-seven, between Sarah Woodward, individually, and Sarah Woodward, as executrix of the last will and testament of Henry S. Woodward, deceased, of Saratoga, Santa Clara county, California, the parties of the first part, and D. F. McConnaughey of St. Louis, Mo., the party of the second part witnesseth:

That the said parties of the first part for and in consideration of the sum of fifteen hundred dollars ($1500.00), lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents remise, release, and forever quit-claim unto the said party of the second part, and to his heirs and assigns the following described tract, lot or parcel of land, situate, lying and being in the county of King, State of Washington, particularly described as follows, to-wit: Lot eight (8), in block eleven (11), of D. S. Maynard's plat of the town (now city) of Seattle. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining and the reversion and

reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

30 SARAH WOODWARD, [SEAL.]
SARAH WOODWARD. [SEAL.]
Executrix of the Last Will and Testament
of Henry S. Woodward, Deceased.

Signed, sealed and delivered in the presence of—
S. L. WHITLATCH.
C. T. JOHNS.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

This is to certify that on this 15th day of March, A. D. 1897, before me, C. T. Jones, a notary public in and for the State of ——, duly commissioned and sworn, personally came Sarah Woodward, individually and Sarah Woodward as executrix of the last will and testament of Henry S. Woodward deceased, to me known to be the individuals described in and who executed the within instrument, and acknowledge to me that they signed and sealed the same as the free and voluntary act and deed of each of them, for the use and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

C. T. JOHNS,
Notary Public in and for the State of California,
Residing at Alameda County, California.

VI.

That the paper writing referred to in paragraph IV hereof was not acknowledged as required by law, in this, that is to say: That the acknowledgment to said deed purports to have been taken before one C. T. Jones, as a notary public, duly commissioned and sworn, but the extent and character of the office of said C. T. Jones is not described or set forth in the said acknowledgment; but said acknowledgment is not subscribed or certified to by said C. T. Jones, as a notary public, or otherwise; and said acknowledgment fails to state that Sarah Woodward, as executrix of the last will and testament of Henry S. Woodward, deceased, acknowledged that she was said executrix, or that she signed and executed said deed as said executrix, having power so to do, for the use and purposes in said deed set forth.

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VII.

That no sale of said premises in so far as any interest of the estate of Henry S. Woodward, deceased, is concerned was ever authorized by the superior court of the State of Washington for King county, wherein said will was probated as aforesaid, nor by any other court of competent jurisdiction; and that no confirmation of the said sale or of the said deed by the plaintiff, Sarah Woodward, as executrix aforesaid, was ever had or obtained from the superior court, nor from any other court of competent jurisdiction; and plaintiffs further allege that said Sarah Woodward was without power as sole executrix of said will, to make a valid conveyance of said premises.

VIII.

That said paper writing or pretended deed is a cloud upon the title of these plaintiffs in and to said described premises.

Fifth Cause of Action.

And for a fifth cause of action and complaint, plaintiffs allege as follows, to-wit:

I.

That plaintiffs are the owners in fee simple of the following described premises in the county of King, State of Washington, to-wit: Lot eight (8), block eleven (11) Maynard's plat of the town (now city) of Seattle, State of Washington.

II.

That defendant did, on or about the 13th day of February, 1897, without the consent of these plaintiffs and against their will, enter into and take forcible and wrongful possession of said premises; that plaintiffs have demanded possession of said premises from said defendants, and they have refused, and now refuse, to deliver to plaintiffs the possession thereof.

III.

That the defendants have collected and received from the said premises as rents and profits since the 13th day of February, 1897, a sum varying from four hundred dollars ($400) to six hundred dollars ($600) per month for each and every month since —
32 date, amounting to a total sum of between seventeen thousand dollars ($17,000) and twenty-three thousand dollars ($23,000); and that all rents and profits so collected were collected wrongfully and without the authority of plaintiffs were and are thereby damaged in a total sum varying from seventeen thousand dollars ($17,000) to twenty three thousand dollars ($23,000); and plaintiffs further allege that they are unable to ascertain the exact amount of the rents and profits received by said defendant from said

premises as aforesaid, and that the same can only be ascertained by requiring an accounting thereof by the said defendant-; and plaintiffs demand an accounting from said defendants and each of them as aforesaid.

IV.

That plaintiffs have been damaged by said defendants on account of said wrongful acts in the sum of twenty three thousand dollars ($23,000).

Wherefore, plaintiffs pray judgment against the defendants as follows, to-wit:

1. That the pretended tax deed to said defendant, H. C. Taylor, referred to in the first cause of action of this complaint be cancelled, set aside and declared null and void and of no effect; and that the tax proceedings in the complaint referred to, in so far as they purport to affect the premises hereinbefore described, be declared null and void.

2. That the quit-claim deed to D. F. McConnaughey mentioned in the second and fourth causes of action be rescinded, cancelled, set aside and declared null and void.

3. That the defendant, D. F. McConnaughey, and all others claiming an interest with him under and by virtue of the proceedings referred to in the third cause of action, be declared a trustee for these plaintiffs and that he be required to convey to plaintiffs, by a good and sufficient conveyance, all the interest held or claimed by him on his own behalf, or otherwise, in and to the premises described in the complaint.

4. That the deed of the defendant, D. F. McConnaughey to the defendant C. K. McConnaughey, in the second cause of action referred to, be declared to be of no effect, and that the same be cancelled and removed as a cloud upon the title of these plaintiffs
33 in and to the premises hereinbefore described.

5. That the defendants, and each of them, be requested to render an accounting as set forth under the fifth cause of action, showing the amount of all moneys received by them or either of them as rents and profits from said described premises; and for a personal judgment against said detendants, and each of them, for the sum which may be found to be due to plaintiffs from the defendants, as rents and profits during the occupancy of said premises.

6. For an order forever quieting the title to said premises in these plaintiffs, and putting plaintiffs in possession of said premises.

7. Also for the costs and disbursements of plaintiffs herein, and for such other and further relief as to the court shall seem equitable and just.

T. O. ABBOTT,
Attorney for Plaintiffs, Rooms 408–410,
Equitable Building, Tacoma, Wash.

STATE OF WASHINGTON, } ss:
County of Pierce, }

I, T. O. Abbott, being first duly sworn, do on oath depose and say that I am the attorney for the plaintiffs in the above entitled action; that I have read the foregoing complaint, know the contents thereof, and believe the same to be true; that the reason I make this affidavit is that the material facts stated in said complaint are within my personal knowledge.

T. O. ABBOTT.

Subscribed and sworn to before me this 24th day of September, 1901.

[SEAL.] F. H. MURRAY,
Notary Public, Residing at Tacoma,
Pierce County, Washington.

34 EXHIBIT "A."

In the name of the Most Merciful God, amen:

I, Henry S. Woodward, of the city of Seattle, county of King and Territory of Washington, being above the age of twenty-one (21) years, and being of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whomsoever, do make, publish and declare this my last will and testament, in manner following, that is to say:

I.

I direct that my body be decently buried, with proper regard for my station and condition in life and the circumstances of my estate.

II.

I direct that my executors hereinafter named, to-wit, Sarah Woodward, George D. Snow, and Josephus Rickey, as soon as they have sufficient funds in their hands, pay my funeral expenses and the expenses of my last illness, and all debts, claims, dues demands and charges properly chargeable against my estate of every name and nature whatsoever.

III.

I give, bequeath and devise unto my said executors, the said Sarah Woodward, George D. Snow and Josephus Rickey, all the rest, residue and remainder whatsoever of my estate, money and property of every name and nature whatsoever and wheresoever situate, real, personal and mixed, of which I shall die seized, possessed, or in any manner whatsoever interested in or entitled to, in trust, nevertheless, and to and for the following trusts, uses and purposes, to-wit:

First. In trust to sell and dispose of my real and personal property at such times and in such quantities and to such persons and for such prices as they, my said executors, shall see fit and deem for the best interests of my estate, to invest all moneys belonging to my estate which shall come into their hands, in such manner as they shall see fit and deem for the best interests of my estate, and to reinvest the same from time to time and keep the same invested in such manner as they shall see fit and deem for the best interests of my estate, or they may keep the whole or any part thereof at interest in such manner as they shall see fit and deem for the best interests of my estate, hereby giving and granting unto my said executors full and ample power and authority to do and perform every act and thing whatsoever requisite and necessary in and about the premises as they shall see fit and deem for the best interests of my estate, to all intents and purposes whatsoever, without question, let, or hindrance whatsoever; they may sell my real and personal estate as hereinabove provided, and they may buy and sell real and personal estate as hereinabove provided, and they may buy and sell real and personal property from time to time as they shall see fit and deem for the best interests of my estate, taking the title in their own names or in the name of any one or more of them, or in the name or names of any other person or persons whomsoever as they may see fit from time to time, with full power and ample authority as aforesaid.

Secondly. During the lifetime of my beloved wife, the said Sarah Woodward, the rents, issues, and profits of all real estate, and the interests of all moneys kept at interest, and all profits whatsoever in any manner whatsoever arising out of my estate, shall go to the said Sarah Woodward, and be and become her property absolutely, and shall be paid set apart, and delivered over to her annually on the first of January in each and every year, and as much oftener as she shall demand the same.

Thirdly. Should such rents, issues and profits of real estate, interest of moneys and profits arising out of my estate as hereinabove provided, together with her other income from all other sources, prove inadequate for the support and maintenance of the said Sarah Woodward, then and in each and every such case she and her coexecutors shall appropriate, set apart, and deliver to her, the said Sarah Woodward, from time to time, out of my estate, such moneys and property available ample and necessary for her support and maintenance, to the end that she shall always be supplied with all the necessaries and comforts of life in an ample, abundant and liberal manner, and she herself shall be the exclusive judge as to what is or may from time to time be necessary for her support, maintenance and comfort, and my said executors shall pay over to her and set apart and deliver to her on her demand, from time to time all moneys and property which she shall or may from time to time so demand, and such moneys and property so demanded paid over, set

apart, and delivered to her as hereby contemplated shall be
36 and remain her own property absolutely and no account of the same shall ever be demanded or exacted from her, and her coexecutors shall make and execute and deliver unto her such conveyances, bills of sale, and assurances as may be requisite and necessary to carry out this branch of my will, and such conveyances, bills of sale and assurances made by her coexecutors shall be ample to convey title to all property, real and personal, so demanded by her as hereby contemplated, including money whenever demanded.

Fourthly. On the death of the said Sarah Woodward, or on my own death in case I survive her, my surviving executors, the said George D. Snow and Josephus Rickey, shall immediately close up their trusts under this will; they shall convert all my property into ready money with all convenient, due and necessary speed, and shall as soon as they possibly can without serious injury to my estate, pay over and deliver such ready money as follows, paying the following sums respectively to the following named persons, respectively, to wit:

1. Unto Mrs. Carrie McNeeley, widow, daughter of my sister Susan, the sum of one thousand dollars ($1,000.00).

2. Unto Mrs. Sarah Whitlatch, wife of Daniel Whitlatch of Ione city, Amador county, California, the sum of one thousand dollars ($1,000.00).

3. Unto my niece, Mrs. Josephus Rickey, daughter of my sister Caroline, of San Diego, California, the sum of one thousand dollars ($1,000.000).

4. Unto Caroline Victoria Lithgow, daughter of my said sister Caroline, of San Diego, California, the sum of one thousand dollars ($1,000.00).

5. Unto Ella McNeeley, daughter of my niece, Mrs. Carrie McNeeley of Reno, Nevada, the sum of five hundred dollars ($500.00).

6. Unto Effie McNeeley, daughter of my said niece, Mrs. Carrie McNeeley, of Reno, Nevada, the sum of five hundred dollars ($500.00).

7. Unto Ettie McNeeley, daughter of my said niece, Mrs. Carrie McNeeley, of Reno, Nevada, the sum of five hundred dollars ($500.00).

8. Unto Jessie Rickey, daughter of my said niece, Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

37 9. Unto Mary Rickey, daughter of my said niece, Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

10. Unto Hettie Rickey, daughter of my said niece, Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

11. Unto Elva Rickey, daughter of my said niece, Mrs. Josephus

Rickey, of San Diego, California, the sum of five hundred dollars ($500.0–)

12. Unto my niece, Georgie Desmond, daughter of my brother Ebenezer, of San Diego, California, the sum of five hundred dollars ($500.00)

13. Unto Mrs. Eliza Woodward, widow of my brother, Arnold, of San Diego, California, the sum of five hundred dollars ($500.00).

14. Unto my niece Emma, daughter of my said brother Arnold, of The Dalles, Oregon, the sum of five hundred dollars ($500.00).

15. Unto my niece, Melvin Mathews, wife of William Mathews, of Humboldt county, California, the sum of five hundred dollars ($500.00).

16. Unto Henry Rickey, son of my said niece, Mrs. Josephus Rickey of San Diego, California, the sum of one thousand dollars ($1,000.00).

17. Unto Frederick Rickey, son of my said niece, Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

18. Unto Ernest Rickey, son of my said niece, Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

19. Unto Susie, daughter of my said niece, Mrs. Sarah Whitlatch, the sum of five hundred dollars ($500.00).

20. Unto Lula, daughter of my said niece Mrs. Sarah Whitlatch, the sum of five hundred dollars ($500.00).

21. Unto Bertha, daughter of my said niece, Mrs. Sarah Whitlatch, the sum of five hundred dollars ($500.00).

22. In case my estate shall be more than sufficient to pay all the charges upon the same and the several sums of money hereinbefore mentioned in the nature of legacies, I direct that the said several legacies be increased *pro rata;* or if my said estate shall be insufficient, then such legacies shall be decreased *pro rata* so as to absorb my entire estate in either case.

38 IV.

I have no separate estate; my entire estate consists of my half of the community property of myself and my said beloved wife, Sarah Woodward.

V.

I do hereby make, nominate, constitute and appoint my beloved wife, Sarah Woodward, of the city of Seattle, county of King, Territory of Washington, and my trusted friend, the said George D. Snow, of the said city of Seattle, county and Territory aforesaid, and my beloved nephew, the said Joseph Rickey, husband of my said niece Mrs. Josephus Rickey, of the city of San Diego, county of San Diego, and State of California, to be executors of this my last will and testament, to serve without bonds.

VI.

I direct and it is my will, that my said executors proceed to settle up and close up all my business and affairs and to execute this my last will and testament in the manner provided herein without bonds and without letters testamentary, and without the intervention or interference whatsoever of the probate or any other court, board or person whomsoever, merely to admit this my last will and testament to probate in the manner provided by law, and to grant certificate of probate thereof, and record the same and grant certificate of such record, and that is all that any court, board, or person whomsoever save only my said executors shall have to do with my estate or the execution of this my last will and testament.

VII.

And I hereby revoke all former wills by me made.

In testimony whereof, I have hereunto set my hand and seal this 10th day of April, A. D. 1888.

HENRY S. WOODWARD. [SEAL.]

The foregoing instrument, *consists* of ten (10) pages besides this, was at the date thereof, by the said Henry S. Woodward, the testator therein named, signed and sealed and published as and declared to be his last will and testament, in presence of us, who, at his
39 request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

WILLIAM W. POOLE,
Residing at Seattle, King County, Washington Territory.
JAMES W. HUGHES,
Residing at Seattle, King County, Washington Territory.

Filed Oct. 17, 1892.
W. B. SPENCER, Clerk.

Whereas, I, Henry S. Woodward, of the city of Seattle, King county, State of Washington, did on the 10th day of April, A. D. 1888, make my last will and testament of this date:

Now I, the said Henry S. Woodward, do hereby declare this to be a codicil to the same.

I do hereby ratify and confirm the said will in every respect, save in so far as any part of it is inconsistent with this codicil.

Unto my niece Georgie Desmond, daughter of my brother Ebenezer of San Diego, California, I direct that the sum of one dollar ($1.00) shall be paid instead of five hundred dollars ($500.00) named in said will.

Unto Earnest Rickey, son of my said niece Mrs. Josephus Rickey, of San Diego, California, I direct that the sum of one dollar ($1.00) shall be paid instead of the sum of five hundred dollars ($500.00) named in said will.

I hereby revoke the appointment of George D. Snow of the city of Seattle, county of King, State of Washington, and I declare it to be my will that in place of the said George D. Snow, Edward Von Tobel of the city of Seattle in said King county, State of Washington, be one of the executors of my said last will and testament.

I declare it to be my will that Sarah Woodward and the said Edward Von Tobel be the sole executors of my said last will and testament, and to that end, I hereby revoke the appointment of Josephus Rickey named in said will as an executor thereof.

I further give and bequeath and direct my executors to pay to each of my heirs at law not named in said will the sum of one dollar ($1.00).

40 In witness whereof I have hereunto set my hand and seal this sixth day of February, A. D. 1891.

HENRY S. WOODWARD. [SEAL.]

The above last written and foregoing instrument consisting of one page besides this, was, at the date thereof, by the said Henry S. Woodward signed and sealed and published as and declared to be a codicil to his last will and testament in presence of us who at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

JOHN COMEY,
Residing at 1428 Sixth St., Seattle, Washington.
MARTIN COPMANN,
Residing at 1420 Sixth Street, Seattle,
King County, Washington.
ALICE E. VON TOBEL,
Residing at 1420 Sixth Street, Seattle, Washington.

Whereas, I, Henry S. Woodward, of the city of Seattle, King county, Washington, did, on the 10th day of April, A. D. 1888, make my last will and testament of that date; and whereas, on the 6th day of February, A. D. 1891, I made a codicil of that date and annexed it to my last will and testament:

Now I, Henry S. Woodward, do hereby declare this to be a second codicil to my last will and testament, and it is my will that this writing be thereto annexed and made a part of the same.

I do hereby ratify and confirm the said will and codicil in every respect save and except so far as any part of the said will or codicil is inconsistent with this codicil.

Unto my niece Mrs. Josephus Rickey, daughter of my sister Caroline of San Diego, California, I direct that the sum of one hundred dollars ($100) shall be paid instead of the sum of one thousand dollars ($1,000) as named in my said will.

Unto Elva Rickey, daughter of my said niece, Mrs. Josephus Rickey, of San Diego, California, I direct that the sum of one
41 dollar ($1.00) shall be paid instead of the sum of five hundred dollars ($500.00) as named in my said will.

Unto my niece, Emma Woodward, daughter of my brother Arnold of The Dalles, Oregon, I direct that the sum of one dollar ($1.00) be paid instead of the sum of five hundred dollars ($500.00) named in my said will.

Unto Henry Rickey, son of my niece Mrs. Josephus Rickey of San Diego, California, I direct that the sum of one dollar ($1.00) shall be paid instead of the sum of one thousand dollars ($1,000.00) as named in my said will.

Unto Carrie Sayer, daughter of my said sister Louise Sweeney of Erie county, Pennsylvania, I direct that the sum of five hundred dollars ($500.00) shall be paid.

Unto the youngest daughter of my brother William Woodward, the name of said daughter being unknown to me at this time, of Erie county, Pennsylvania I direct that the sum of five hundred dollars ($500.00) be paid.

In witness whereof, I have hereunto set my hand and seal this fifteenth day of June, A. D. 1891.

HENRY S. WOODWARD. [SEAL.]

The foregoing last written instrument, consisting of two pages besides this, was at the date thereof, by the said Henry S. Woodward signed and sealed and published as and declared to be a codicil to his last will and testament in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

JOHN CORNEY,
Residing at Seattle, Wash.
J. S. LORRAINE,
Residing at Seattle, Washington.
MARTIN COPMANN,
Residing at Seattle, Washington.

42 STATE OF WASHINGTON, } ss.:
County of King, }

L. H. Wheeler being first duly sworn says: I served the foregoing amended complaint upon the attorney for the defendants R. S. Jones, on the 25th day of September 1901, by delivering and leaving a copy thereof in a conspicuous place in his office, towit upon his office desk, in his office in the Colman building in the city of Seattle, Washington, said Jones being absent therefrom.

L. H. WHEELER.

Subscribed and sworn to before me this 25th day of Sept. 1901.

N. S. PETERSON,
Notary Public.

Filed Sept. 25, 1901.

C. A. KOEPFLI, Clerk.
5—57

43 In the Superior Court of the State of Washington in and for the County of King.

SARAH WOODWARD and JOHN H. McGRAW, Administrator, Plaintiffs, vs. H. C. TAYLOR, LIDA R. TAYLOR, His Wife; J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants.	No. 31864. Demurrer to Amended Complaint.

Come now the defendants and appearing jointly to the amended complaint heretofore served in this action, demur to said amended complaint upon the grounds and for the reasons following, to-wit:

I.

That several causes of action have been improperly united.

II.

That said amended complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That this action has not been commenced within the time limited by law.

Further demurring to the amended complaint of the plaintiffs in this action these defendants demur to the first cause of action set forth in said amended complaint upon the grounds and for the reasons following, to-wit:

I.

That several causes of action have been improperly united;

II.

That the first cause of action does not state facts sufficient to constitute a cause of action against these defendants, or either of them;

III.

That said first cause of action has not been commenced within the time limited by law.

Further demurring to said amended complaint of the plaintiffs in this action these defendants demur to the second cause of action set forth in said amended complaint upon the grounds and for the reasons following, to-wit:—

44

I.

That several causes of action have been improperly united.

II.

That the said second cause of action does not state sufficient facts to constitute a cause of action against these defendants, or either of them.

III.

That said second cause of action has not been commenced within the time limited by law.

Further demurring to said amended complaint of the plaintiffs in this action these defendants demur to the third cause of action set forth in said amended complaint upon the grounds and for the reasons following, to-wit:

I.

That several causes of action have been improperly united.

II.

That the said third cause of action does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That said third cause of action has not been commenced within the time limited by law.

Further demurring to said amended complaint of the plaintiffs in this action these defendants demur to the fourth cause of action set forth in said amended complaint upon the grounds and for the reasons following.

I.

That several causes of action have been improperly united.

II.

That the said fourth cause of action does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That said fourth cause of action has not been commenced within the time limited by law.

Further demurring to said amended complaint of the plaintiffs in this action the defendants demur to the fifth cause of action set forth in said amended complaint upon the grounds and for the reasons following; to-wit:

I.

That several causes of action have been improperly united.

II.

That the said fifth cause of action does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said fifth cause of action has not been commenced
45 within the time limited by law.

Very respectfully submitted.

R. S. JONES,
Attorney for the Defendants.

Filed Sept. 27, 1901.

C. A. KEOPFLI, Clerk.

In the Superior Court of the State of Washington in and for the County of King, Department No. I.

SARAH WOODWARD ET AL., Plaintiffs,
vs.
H. C. TAYLOR ET AL., Defendants.
} No. 31864. Order Sustaining Demurrer.

The above entitled matter coming on regularly to be heard upon demurrer of defendants to the amended bill of complaint of the plaintiffs herein, and argument upon said demurrer having been heard, brief submitted, and the court having taken the same under advisement, and being fully advised in the premises, it is hereby ordered and directed that the demurrer of defendants to the first cause of action set forth in plaintiffs' complaint be and the same is hereby overruled, to which order defendants object and exception is allowed;

It is further ordered and directed that the demurrer of defendants to the second cause of action set forth in plaintiffs' complaint be and the same is hereby overruled, to which order defendants object and an exception is allowed.

It is further ordered and directed that the demurrer of defendants to the third cause of action set forth in plaintiffs' complaint be and the same is hereby overruled, to which order defendants object and an exception is allowed.

It is further ordered and directed that the demurrer of defendants to the fourth cause of action set forth in plaintiffs' complaint be and the same is hereby sustained and allowed, to which plaintiffs object and the exception is allowed.

46 It is further ordered and directed that the demurrer of defendants to the fifth cause of action set forth in plaintiffs' complaint be and the same is hereby overruled, to which order defendants object and an exception is allowed.

And it is further ordered and directed that plaintiffs have 10 days from the date of the signing of this order within which to amend their bill of complaint, or to plead further.

Done in open court on this 23rd day of November, 1901.

ARTHUR E. GRIFFIN, Judge.

Filed Nov. 23, 1901.
C. A. KEOPFLI, Clerk.

47 In the Superior Court of the State of Washington for King County.

SARAH WOODWARD and JOHN H. McGraw, as Administrator with the Will Annexed of the Estate of Henry S. Woodward, Deceased, Plaintiffs, vs. H. C. TAYLOR and LIDA R. TAYLOR, His Wife, J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants.	Second Amended Complaint.

Come now the plaintiffs upon leave of court first obtained, and not waiving any right or rights thereby, and complaining against the defendants, file this, their second amended complaint, and for cause of complaint allege as follows:

For a first cause of action.

I.

That on the 18th day of September, 1892, Henry S. Woodward died testate, leaving as his last will and testament, an instrument in writing, wherein and whereby the plaintiff, Sarah Woodward, and one Edward Von Tobel were nominated and appointed as the executors thereof: That in and by the terms of said will, Sarah Woodward was made sole heir during her lifetime, of the said Henry S. Woodward, and it was provided therein that the said executors should proceed to settle and close up all the business and affairs of said estate and to execute said last will and testament in the manner provided therein without bonds, and that letters testamentary should not be required,

and without the interference or intervention of a probate or any other court, board or person whomsoever; that thereafter, and prior to the admission of said will to probate, the said will was duly filed in the superior court of the State of Washington, for King county, and upon due proceedings had and due proofs made, was, on the 25th day of November, 1892, by the decree of said superior court, duly admitted to probate, and thereafter, on said 29th day of November, a certificate of the probate thereof was duly issued by the said superior court, under the seal thereof; that thereafter, on the 30th day
48 of November, 1892, the said Edward Von Tobel filed in said superior court an instrument in writing wherein and whereby the said Von Tobel renounced the executorship under said will and declined and refused to qualify as such executor; that thereafter, on said 30th day of November, 1892, the said superior court issued letters to the said Sarah Woodward, as executrix of said last will and testament; that the said Sarah Woodward, on the 29th day of November, 1892, filed in the above entitled superior court her oath as said executrix, and ever since thereafter, until the 20th day of September, 1901, acted as the sole executrix of the said last will and testament.

II.

That thereafter, on or about the 20th day of September, 1901, said Sarah Woodward resigned her letters as said executrix, and John H. McGraw was by order of the above entitled court in said cause, duly entered, regularly and lawfully appointed as administrator with the will annexed, of the estate of said Henry S. Woodward deceased, and he thereupon qualified as said administrator, and has since acted and now acts as such; and said plaintiff, John H. McGraw, as said administrator, was heretofore, to-wit, on the — day of September, 1901, duly substituted in the above entitled action, by order of the above entitled court duly entered as one of the plaintiffs herein.

III.

That the plaintiff Sarah Woodward is and was during all the times hereinafter mentioned a non-resident of the State of Washington, her residence being during all of said times in the county of Santa Clara, State of California.

IV.

That for a long time previous to, and at the time of, the death of said Henry S. Woodward, as aforesaid, he was together with the plaintiff, Sarah Woodward, the owner in fee simple, as community property, of all that certain piece or parcel of land situate in the city of Seattle, State of Washington, particularly described as follows:
Lot eight (8) in block eleven (11) of Maynard's plat of the town
49 (now city) of Seattle, as the same appears of record in the office of the auditor of King county, said State; and said property, at the time of the decease of said Henry S. Woodward, as aforesaid,

and during all the times hereinafter mentioned, contained and now contains large and valuable improvements, and was and is, capable of producing, and did produce, and now produces, large revenues in the way of rents and profits, and was and is of considerable value therefor.

V.

That plaintiffs are now, and during all the times hereinafter complained of, were the lawful owners and holders of the title in fee simple to said premises, and entitled to the possession thereof, and that the defendants, claim some interest, right, or title in or to said premises, under and by virtue of a certain pretended tax deed made to the defendant, H. C. Taylor, on or about the 13th day of February, 1897, which said Taylor claims to hold for the benefit of himself and the other defendants, but plaintiffs allege that said pretended deed, is wholly invalid and void, and ineffective to convey any right, or title in said premises to said defendants, or either of them, for the following reasons, to-wit: That the pretended assessment, sale, assignment, tax certificate, notice of application for deed, notice of expiration of period of redemption, and the said deed, and all and every proceeding relating to the same, or any part thereof, was, were, and are wholly illegal, contrary to law, fraudulent and void, upon the following grounds, to-wit:

1. That the assessment rolls for said county for said year 1891 consisted of 15 volumes numbered from 1 to 15; that all the entries of any kind whatsoever relative to the assessment of said premises for taxation were contained in volume 11 of said rolls, and not elsewhere; that the pretended assessment and listing for taxation of the said described premises was wholly incomplete, insufficient, irregular, contrary to law, and without any notice whatsoever to the owners of said premises, to-wit, the plaintiffs herein: that the assessor of said King county failed and neglected to make out in the said assessment rolls, or at all, a list showing the names of the owners of said premises, to-wit, the plaintiff Sarah Woodward and said Henry S. Woodward, deceased, or that the names of said owners were unknown to said assessor; but said assessor did, as these plaintiffs have since learned make certain entries (together with others) in volume 11 of said rolls at page 2481, as follows:

No. of line.	Name of owner.	No. of lot.	No. of blk.	Name of plat.
10	C. Winehill.	8	11	Maynard's plat.

that no other entries whatsoever relating to the name of the owners of said premises were made at any other place in said book, or in any other book or books of said roll; and plaintiffs allege that no person by the name of C. Winehill was ever the owner of said premises, or any part thereof, when said assessment was attempted to be so levied, or at any other time, and that no person by the name of C. Winehill, ever claimed to have any interest whatsoever

in said premises at said time or at any other time; but that said premises were owned at said time by said Henry S. Woodward, afterwards deceased as aforesaid, and the plaintiff Sarah Woodward, as their community property as aforesaid, and that said ownership was a matter of public record in the office of the auditor of said King county.

2. That the said assessor failed and neglected to make return to the county auditor of said county of said assessment rolls including said Book No. 11 in the manner or within the time required by law, or at all, or to attach to said Book No. 11 or any other book of said rolls, an affidavit as required by law, or any affidavit at all, except that he affixed to volume 15 of said rolls, a pretended affidavit, in words and figures as follows, to wit:

STATE OF WASHINGTON, } ss:
County of King, }

I, Frank Paul assessor of King county, do solemnly swear, that the books vol. 1 to 15 inclusive, including pages from 1 to 3496, to which this is attached, contains a correct and full list of all the real property subject to taxation in King county, so far as I have been able to ascertain the same; and that the assessed value set down in the proper column, opposite the several kinds and descrip-
51 tions of property, is in each case a fair value of such property, to the best of my knowledge, and belief, and that the footings of the several columns in said books, and the tabular statements returned herewith are correct as I verily believe.

FRANK PAUL, Assessor.

Subscribed and sworn to before me this 31st day of July, 1891.

F. A. TWICHELL,
[AUDITOR'S SEAL.] Auditor of King County.

3. That said county auditor failed and neglected to make or enter in each of said tax books or lists a certificate within the time or in the manner required by law, or at all, certifying that said rolls contained a correct list, or any list, of all real and personal property in the said county of King, subject to taxation; that the only certificate, or pretended certificate of said auditor affixed to said volume 11, was entered on page 2894 thereof, and was in words and figures as follows, to-wit:

I, F. A. Twichell, auditor of King county, State of Washington, do hereby certify that the following is a correct list of taxes levied on the real property in the county of King for the year one thousand eight hundred and ninety-one.

Witness my hand and seal this 30th day of November, 1891.

F. A. TWICHELL,
[AUDITOR'S SEAL.] County Auditor.

4. That said county auditor failed and neglected to deliver said assessment rolls to said county treasurer within the time or in the manner required by law, or at all, with his warrant thereto attached authorizing the collection of taxes, or with any warrant thereto attached, except that a pretended delivery of said books by said county auditor to said treasurer was made on the 9th day of December, 1891; and a pretended warrant was thereto affixed to volume 15, and no other volume of said rolls, as follows, to-wit:

STATE OF WASHINGTON, } ss.
County of King, }

The State of Washington to Byron Phelps, county treasurer of King county, State of Washington, Greetings.

52 In the name of the State of Washington, you are hereby commanded to collect the taxes charged in the real property assessment roll of said King county, being volumes 1 to 15 inclusive for the year one thousand eight hundred and ninety-one, as required by law.

Witness my hand and official seal of office this 9th day of November, A. D. 1891.

[AUDITOR'S SEAL.] F. A. TWICHELL,
County Auditor of King County, Washington.

5. That said county treasurer failed and neglected to transcribe into a book known as the "Tax Judgment Sale, Redemption, and Forfeiture Record," a description of the said described premises showing the name of the owners of said land, to-wit, plaintiff Sarah Woodward and said Henry S. Woodward deceased; but on the contrary he pretended to transcribe said lands on such record showing that the same were owned by another person, to-wit, one C. Winchill, who was not during any of said time the owner of said premises, nor any part thereof, nor any interest therein; and he did enter therein the name of said C. Winchill, as the name of the person to whom said premises had been assessed, whereas in truth and in fact said premises were not assessed or pretended to be assessed in the name of C. Winchill; but said pretended transcript was in words and figures as follows, to-wit:

No. of line.	Name of owner.	No. of lot.	No. of blk.	Name of plat.
23	C. Winchill.	8	11	Maynard's plat.

6. That a pretended sale of said premises, for delinquent taxes was held by said treasurer on the 7th day of June, 1894; and said premises were pretended to be sold and forfeited at said time to said King county, for the sum of $412.65, as taxes alleged to be due thereon, $41.27; as penalty, and $199.75 as interest, making a total of $653.70; and thereafter, on or about the 6th day of February, 1895, said treasurer pretended to issue a certificate of purchase to

said defendant, H. C. Taylor, but plaintiffs allege that said pretended certificate of purchase failed to describe the said premises as the property of plaintiff Sarah Woodward and Henry S. Woodward, deceased, and failed to describe said premises as the property
53 of any person whomsoever; and further, that said pretended certificate of purchase was not executed by the treasurer of said King county under his hand and seal as required by law, or at all Said pretended certificate is in words and figures as follows, to-wit:

$740.86. (Issued under Section 134, Revenue Act 1893.)

Certificate of Purchase of Real Estate Sold and Forfeited to the County of King.

STATE OF WASHINGTON, } ss.:
County of King, }

In the name of the State of Washington,

I, A. P. Mitten treasurer of King county, in said State, do hereby certify that at a sale of real estate, held at the front door of the court house in said county, (of which notice was duly and regularly given), on the fifteenth day of June, 1894, pursuant to the order and judgment of the superior court of said King county, Washington, duly made and entered in the "Tax Judgment Sale Redemption and Forfeiture Record, in said court, on the 14th day of May, 1894, in proceedings regularly and duly — therein, on application of the undersigned as treasurer of said county for judgment for sale of the delinquent lots and lands in said application described, for the delinquent taxes for the year 1891, together with the interest, penalties, and costs due thereon, the following described lots, pieces, tracts and parcels of land situated in said county to-wit: lot 8, block 11 Maynard's plat were, on the fifteenth day of June, 1894, between the hours of 10 o'clock a. m. and 3 o'clock p. m. offered for sale whereupon there being no bidders therefor, the same was sold and forfeited to said county of King for the amount of the taxes, assessments, interest, penalties, and costs due thereon, to-wit: Four hundred and twelve 65/100 dollars taxes, forty-one 27/100 dollars penalty, one hundred ninety-nine 73/100 dollars interest and five cents (.05) *dollars* costs, making a total of six hundred fifty three 70/100 dollars due thereon, as aforesaid, the same being the amount for which said land was sold and forfeited to said county.

54 And whereas, H. C. Taylor, of Seattle, Wash. has applied to the undersigned as county treasurer of said county to purchase the above described land, and has paid to such treasurer the sum of seven hundred and forty 86/100 dollars, the same being the total amount due upon said land and for which the same was sold and forfeited to the county of King as aforesaid, together with the penalties, interests, and costs on all taxes heretofore forfeited.

Now therefore, in consideration of the premises aforesaid, the said county of King does remise, release, and set over unto the said H. C. Taylor, all of its right, title and interest of, in and to the said described real estate, and each and every part thereof; *provided*, however, that said property is sold subject to redemption according to law in such cases made and provided. And the holder of this certificate will be entitled to a deed from the treasurer of said *county for said real estate at any time after the expiration of two* years from the date of said sale, if the same be not redeemed within said time.

I further certify that the holder of this certificate must take out a deed for said land and file the same for record within one year from and after the time he is entitled to such deed, otherwise this certificate and any deed he may receive thereon, and the sale on which this certificate is based, will be null and void; provided, however, that if the holder of this certificate shall be prevented from obtaining such deed by an injunction or order of any court, or by the refusal of the treasurer to execute the same, that the time he is so prevented shall be excluded from the computation of such time.

Witness my hand and official seal this, the sixth day of February, 1895.

A. P. MITTEN,
Treasurer of King County, Washington,
By JNO. RIPLINGER, Deputy.

7. That the defendant, H. C. Taylor, failed and neglected to publish or give notice in the manner required by law, or at all, to the owners of said premises of his intention to apply for a deed to said premises under and by virtue of said alleged tax sale; and
55 said Taylor well knowing that plaintiff Sarah Woodward and the said Henry S. Woodward, deceased, were the owners of said premises as aforesaid, failed and neglected before the expiration of the time of redemption from the pretended sale aforesaid, or at all, to serve or cause to be served, a written or printed, or partly written and partly printed, notice of such purchase on the person in whose name the same was assessed, or on the plaintiff Sarah Woodward and said Henry S. Woodward, deceased, as the owners of said premises as aforesaid, or on any person or persons interested in said premises, stating the date when the period of redemption would expire, and failed and neglected to make diligent or any search or inquiry for the person in whose name said premises were pretended to be assessed, or for the said owners or for any other person claiming to be the owner or person interested in said premises; but the only notice or pretended notice given by any person or persons whomsoever as to the expiration of the period of redemption from any sale of said premises, or the pretended sale thereof as aforesaid, was published in the Seattle Argus, and was in words and figures as follows, to-wit:

Notice.

To C. C. Winchell, the person in whose name was taxed Gustave Winehill and Mattie Ford, the owners of the lot hereinafter described, and all persons interested therein:

You and each of you are hereby notified that the following described real estate situate in the county of King, and State of Washington, to-wit: lot eight (8) in block eleven (11), as shown on Maynard's plat of the town (now city) of Seattle of record in the office of the auditor of said King county, was offered for sale for the county and State taxes of 1891, on the 15th day of June, 1894, and no bidder appearing therefor, the same was on said day duly sold and forfeited to the county of King in the State of Washington. That thereafter, on the 6th day of February, 1895, H. C. Taylor of the city of Seattle, county of King and State of Washington, applied to the county treasurer of said county of King to purchase the above described land, and paid to such county treasurer the sum, seven hundred and forty and 86/100 dollars, the same being the total amount due upon said land, and for which the same was sold and forfeited to the county of King as aforesaid, together with all penalties, in-
56 terest and costs thereon; that thereupon a receipt therefor and certificate of purchase of said lot issued from the county of King, under the hand of the treasurer of said county to said H. C. Taylor for the above-described real estate, and said H. C. Taylor is now the owner and holder of said receipt and certificate. That said lot was taxed in the name of C. Winchell; that said lot was taxed for the year 1891; that the time of redemption will expire on the 6th day of February, 1897, after which date application will be made for a deed to said property as provided by law.

H. C. TAYLOR,
BRINKER, JONES & RICHARDS,
Attorneys for Certificate Holder.

8. That said Taylor failed and neglected by himself or any agent to make or deliver to said county treasurer any affidavit of having complied with the conditions required by law, entitling him to demand and receive a deed to said premises, or any affidavit showing diligent or any search for these plaintiffs as the owners and persons interested in said described premises; but plaintiffs allege that said Taylor and his agents well knew the said owners to be the plaintiff Sarah Woodward and said Henry S. Woodward, deceased, and none others, and that he and they well knew the address of the said Sarah Woodward, and of the executrix of said estate, at said time; and that he wholly failed and neglected to give them or either of them any notice whatsoever of his intention to apply for the issuance of a tax deed to said premises; that the only affidavit, or pretended affidavit of any person, concerning the intention to apply for any deed as aforesaid, was in words and figures as follows, to-wit:

STATE OF WASHINGTON, } ss:
County of King, }

J. W. McConnaughey, being first duly sworn, on oath deposes and says: That he is the agent of H. C. Taylor, the person whose name is subscribed to the notice of application for tax deed, a copy of which is hereto attached; that he has made careful and diligent search and inquiry for the person in whose name the lot in said notice described was taxed, and find the same to have been
57 taxed to C. Winchell and for the owners of the persons interested in said lot, viz: Gustave Winehill and Mattie Ford, who are named in said notice and to whom said notice is addressed, and that said persons cannot be found in said county of King, State of Washington; that he published the original notice, of which the attached is a true copy in the Argus, a newspaper of general circulation in said county of King, in which the land in said notice described is situated; that said notice was inserted three times in three regular and separate editions of said newspaper, the date of the first insertion and publication being on the 2nd day of January, 1897; the date of the second insertion and publication being on the 9th day of January, 1897, and the date of the last publication being on the 16th day of January, 1897; the first publication being not more than three months and the last one not more than one month prior to the date of the expiration of the time of redemption of said property from tax sale.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11th day of February, 1897.

R. S. JONES,
Notary Public in and for the State of
Washington, Residing at Seattle, Wash.

That there was affixed to said affidavit a printed copy of the notice set forth in subdivision 7 of this paragraph.

9. That said H. C. Taylor did not by himself or any agent, previous to the said application for a tax deed, pay or cause to be paid, all the taxes subsequently assessed upon said premises for the various years subsequent to the year 1891, but he neglected to pay, or cause to be paid, the taxes so levied upon said premises for the years 1894, 1895 and 1896, and that he was thereby deprived of any right he may have previously had to demand and receive a deed to said premises by virtue of any of the proceedings hereinbefore referred to, or otherwise.

10. That by virtue of all the matters and things hereinbefore set forth, the said H. C. Taylor, and all persons interested with him as aforesaid was deprived of the right to demand and receive a deed to said premises from the said treasurer; but that nevertheless, a pre-

tended tax deed was, on or about the 13th day of February,
58 1897, issued to said Taylor as aforesaid; but said pretended tax deed was not signed and executed by the county treasurer of said King county under his hand and seal, or at all; and said deed failed to describe in intelligible language, or in such language as could be readily understood from an inspection thereof, the particular tax or taxes for which said deed purported to be executed, and failed to state that said premises had been sold to pay said taxes, and that the same had not been redeemed from said sale as required by law or at all; and failed to state that said premises were subject to any redemption provided by law; and failed to state that the same was taken out within one year from the time that the grantee was entitled to the same; that said pretended deed was and is in words and figures as follows, to-wit:

STATE OF WASHINGTON, } ss:
County of King, }

Whereas, at a public sale of real estate for the non-payment of taxes, penalties, interests and costs held in the county aforesaid, on the 15th day of June, 1894, the following described real estate was offered for sale for 1891 taxes, to-wit, lot eight (8) block eleven (11) Maynard's plat of the town (now city) of Seattle, as shown on the recorded plat, whereupon there being no bidders therefore, the same was forfeited to the said county of King; and, whereas, on the 6th day of February, 1895, the said real estate was sold by the county treasurer of said county in strict compliance with the provisions of section 34 of chapter 124, Session Laws of the State of Washington of 1893; and whereas, the same not having been redeemed from sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the State of Washington, necessary to entitle him to a deed for said real estate:

Now, therefore, know ye that I, Charles F. Whittlesey, county treasurer of said county of King, in consideration of the premises and by virtue of the statutes of the State of Washington in such cases provided, do hereby grant *the* convey unto H. C. Taylor, his heirs and assignees forever, the real estate hereinbefore described.

— —.

59 Given under my hand and seal of office this 13th day of February, A. D. 1897.

[King Co. Treasurer's Seal.]

CHARLES F. WHITTLESEY,
County Treasurer of King County, Washington.
P. P. PADDEN.

11. That all the proceedings in this paragraph hereinbefore enumerated was and were in violation of article V, and the first section of article XV of the amendments to the Constitution of the United

States and of section III of article I of the constitution of the State of Washington in this: That they constituted an attempt to deprive plaintiffs of their property without due process of law.

VI.

That heretofore on the first day of March, 1901, at the hour of 10:30 o'clock a. m. of said day at his office, No. 819 Second avenue in the city of Seattle, State of Washington, and before the beginning of this action, plaintiff tendered in gold coin of the United States, to the defendant, H. C. Taylor, for himself and as agent for J. W. McConnaughey, and any and all persons having or claiming any interest with him under and by virtue of any of the proceedings hereinbefore set forth, all taxes, penalties, interest and costs paid by said Taylor at said pretended tax sale, or by any of his assignees, or grantees, or subsequently paid by them, or either of them, as taxes, penalties and interest on said premises, amounting to the total sum of nine thousand four hundred and thirteen and eighty one-hundredths dollars ($9413.80), as follows to-wit:

Taxes for y'r.	Am't p'd.	Date of pay't.	Rate of int.	Amount tendered.
1890	$732.95	Feb. 26, '95	20 per cent.	$1564.72
1891	740.86	Feb. 6, '95	20 per cent.	1639.89
1892	458.09	M'ch 26, '96	12 per cent.	728.95
1893	691.20	June 26, '95	12 per cent.	1161.80
1894 & 1895..	1718.95	Oct. 31, '99	15 per cent.	2062.74
1896	208.04	June 8, '97	15 per cent.	464.92
1896	298.03	Nov. 30, '97	15 per cent.	443.29
1897	423.36	May 31, '98	15 per cent.	597.96
1898	194.40	May 29, '99	15 per cent.	245.38
1898	194.40	Nov. 29, '99	15 per cent.	236.85
1899	237.60	May 31, '00	15 per cent.	267.30
Total				$9413.80

And said tender and each and every part thereof was re-
60 fused; that said Taylor made no objection at said time to the amount or manner of said tender, in any respect whatever, but declined the same and each and every part thereof absolutely; that said Taylor admitted at said time that he was the owner jointly with the defendants D. F. McConnaughey and J. W. McConnaughey of the claim of title under the said pretended tax proceedings hereinbefore referred to, and that he was the agent for the said McConnaugheys under said claim.

And thereafter, on the same day, at the hour of 12:30 o'clock p. m. the plaintiffs caused to be tendered to the county treasurer of said county of King the sum of two hundred sixty-four and eighty-five one-hundredths dollars ($264.85), on account of taxes justly due and remaining unpaid on said premises for the year 1899; and there-

upon, said county treasurer issued a temporary receipt to the person by whom said tender was made on behalf of these plaintiffs accepting said tender that thereafter, to-wit, on the 8th day of March, 1901, the said treasurer returned said sum to the person making said tender on behalf of these plaintiffs and declined to issue a final receipt therefor.

And plaintiffs aver that they are willing, and ready to pay the defendants said sum or sums, and any and all sums which may be found to have been lawfully paid by said defendants, on account of any tax lawfully levied upon said premises.

Second Cause of Action.

And for a second cause of action and complaint plaintiffs allege as follows, to-wit:

I.

Plaintiffs allege and reaffirm all the allegations, matters and things set forth in the first cause of action of this complaint, and the same and each and every part thereof, is made a part of this cause of action, in all respects as therein stated, as fully as if the same were here reiterated.

II.

That during and by virtue of the terms of the said will of said Henry S. Woodward, deceased, the plaintiff, Sarah Wood-
61 ward, was to receive during her natural lifetime all of the rents, issues and profits of the entire estate of said deceased, of whatsoever nature to be and become her property absolutely, for her support, maintenance, and comfort; and should such rents, issues and profits prove inadequate for her support, maintenance and comfort, then, and in such case said Sarah Woodward and Edward Von Tobel, as executors of the last will and testament of Henry S. Woodward, deceased, were at once empowered under the terms of said will, to appropriate and set apart such properties or assets of said estate as they should deem necessary for the support, maintenance and comfort of the plaintiff, Sarah Woodward, the same to become the property of said Sarah Woodward, absolutely for her own exclusive use and benefit; the entire purpose, intent and object of said will to provide the plaintiff Sarah Woodward with such complete and ample support and maintenance as said estate should be capable of during her lifetime; and the said executors, Sarah Woodward and Edward Von Tobel were empowered to do any and all things in and about said estate necessary, convenient and proper and as they should deem fit, for the carrying out of said purpose, intent and object; and for a more convenient and specific statement of the purpose and intent of said will, a copy thereof is attached to this complaint as Exhibit "A" and made a part hereof.

III.

That said premises contained extensive improvements and during all the times herein mentioned were capable of producing and did produced large revenues, in the way of rents and profits; that owing to the absence of plaintiff Sarah Woodward from the State of Washington, it became necessary to have an agent resident at the city of Seattle for the purpose of caring for said premises, collecting the rents and profits thereof, and paying all taxes lawfully levied thereupon; and for such purpose only, during a portion of said period; to-wit, from the 21st day of December, 1895, until the 1st day of December, 1897, plaintiff Sarah Woodward constituted and appointed one Oscar Knox as her agent, to represent her as aforesaid,
and as such agent said Knox was empowered to collect the
62 rents and profits and to care for said estate, making due,
truthful ample and complete returns to her of all his doings as such agent, and to collect and remit to her all the rents and profits of said estate, saving only such as were necessary and proper for payment of all taxes at any time lawfully levied against said premises, and for the care and maintenance of such premises; and said Knox was further empowered to advise her as to the condition of said estate from time to time.

IV.

That during the entire period of the agency of said Knox, as aforesaid, said premises were *continuously* occupied by tenants, and constantly produced a large sum as rents and profits, greatly in excess of the cost of maintenance thereof; and said Knox collected and received as said agent all the said rents and profits, and made disposition thereof in a manner to these plaintiffs unknown, except that during the period of the said agency of said Knox, previous to the acts herein complained of, he remitted to said Sarah Woodward of said rents and profits only the sum of fifty-four dollars and eighty-three cents ($54.83); and that contrary to and in violation of the terms of said agency, said Knox failed to pay or cause to be paid any tax or taxes levied upon said premises during the period of said agency, or any tax or taxes previously levied thereon which had become delinquent; during the period of said agency of the said Knox, no accounting with him was had or could be secured whereby to ascertain the amount of said rents and profits.

V.

That as a result of the negligence and mismanagement of the affairs committed to his care as aforesaid, by the said Knox, the plaintiff Sarah Woodward became and was in a state of great distress of mind and body, and was lacking in funds wherewith to procure the necessary comforts and food with which to sustain the ordinary demands of life; and she was compelled to avail herself of all

means within her power to obtain funds from the said estate of herself and said Henry S. Woodward, deceased, necessary for her maintenance and support; and said plaintiff Sarah Woodward being then of great age, to-wit, of the age of seventy-seven years, and having the natural infirmities incident thereto, and being also
63 afflicted with severe bodily illness, she became and was incompetent to understand and transact business and unable to accurately judge of the conditions surrounding said estate; and being a non-resident of said city and State she was compelled to rely upon the advice of her said agent.

VI.

That while plaintiff Sarah Woodward was ignorant of the true condition of said premises as aforesaid, and was in said condition of distress and was lacking in means, and while her age and infirmities rendered it impossible for her to earn or obtain means of subsistence otherwise, said Knox, on or about the 12th day of June, 1896, represented to her that one J. W. McConnaughey, had purchased the title to said premises under a certain tax sale, for taxes which had been lawfully levied upon said premises for the year 1891, and which had become delinquent, and that she was in danger of losing her entire interest and the interest of the estate of said Henry S. Woodward, deceased, in said premises under and by virtue thereof; which plaintiffs subsequently ascertained to be the tax sale referred to in the first cause of action; and said Knox further represented that said McConnaughey was threatening to take possession of said premises, and oust the plaintiffs therefrom, and that in case he should carry out his threat these plaintiffs would be deprived of all and every right or claim of right they might have in and to said premises; that thereafter, at various times, said Knox informed plaintiff Sarah Woodward, that said McConnaughey was threatening to take possession of said premises; and that he made various demands for the payment of various sums for an extention of time which he pretended to be able to give within which to redeem said premises from said tax sale.

VII.

That on or about the 10th day of February, 1897, said Knox, acting at the instance and request of the defendants, submitted an offer to plaintiff Sarah Woodward from defendants, as follows, to-wit: That the defendants herein would pay her the sum of fifteen hundred dollars ($1500) net, and assume all liens or claims, or encumbrances of whatsoever nature upon said premises in considera-
64 tion of a quit-claim deed to said premises from said plaintiff; that said offer was in writing and was in words and figures as follows, to-wit:

SEATTLE, WASH., Feb. 10, 1897.

Mrs. Woodward, Saratoga, Cal.:

* * * The tax certificate man will give us *$1500 net* and take care of the lienors so no personal liability will attach to you. * * *

Yours friend, O. KNOX.

And said Knox further represented that while said quit-claim deed was not necessary to vest in said defendants a complete title to said premises, they would nevertheless pay the said sum therefore; and said Knox further represented that unless said proposition should be accepted, and said quit-claim deed executed, that no sum whatsoever could be obtained from any source whatsoever by the said plaintiff Sarah Woodward, or the estate of said Henry S. Woodward, deceased.

VIII.

That thereafter, to-wit, on the 13th day of February, 1897, the defendants, H. C. Taylor, D. F. McConnaughey and J. W. McConnaughey, acting through their agent, J. W. McConnaughey, well knowing that said claim of tax title to said premises was wholly insufficient, invalid, void, and ineffective to convey to them any substantial interest in said premises, but still persisting therein, and well knowing the condition of distress of said Sarah Woodward, as aforesaid, and with intent to cast a cloud upon the title to said premises, and with intent to harass and embarrass said plaintiff Sarah Woodward, and thereby force and compel her to give up said premises for a nominal consideration proceeded to and did take wrongful possession of said premises; that said possession was so taken by force, and violently, and not by any proceeding at law; and said McConnaughey acting for himself and the other defendants, informed all persons then occupying said premises as tenants that he was the owner of said premises; and he threatened said persons with expulsion from said premises and with prosecution for debt should they thereafter pay any sum whatsoever on account of rent of said
65 premises, to any person whomsoever other than himself; and plaintiffs allege that the taking possession of said premises at said time and in the manner aforesaid was contrary to law, and without the consent of these plaintiffs and in defiance of the rights of these plaintiffs, and was done for the purpose of carrying out the plan of said defendant, J. W. McConnaughey, to defraud and deprive these plaintiffs of said premises and for the purpose of harassing and embarrassing them in the use and enjoyment thereof, thereby seeking to obtain the real title to said premises for a nominal sum.

IX.

That thereafter, on or about the 9th day of March, 1897, said Knox acting at the instance and request of the defendants, and under their direction, forwarded to plaintiff Sarah Woodward,

through one A. S. Kittredge her attorney at the city of San Jose, California, a paper writing purporting to be a quit-claim deed to said premises, for the expressed consideration of fifteen hundred dollars ($1500) made in the name of the defendant D. F. McConnaughey as grantee; and said Knox advised said plaintiff that immediately upon the return of said deed the defendants would pay the whole amount of the said sum of fifteen hundred dollars ($1500), without any deductions whatsoever, which said sum would be immediately paid to said plaintiff for her own use; and that the said defendants would assume all liability whatsoever attaching to said premises; that accompanying said deed was a proposition in writing, made at the instance and request of the defendants, said writing being in words and figures substantially as follows, to-wit

SEATTLE, WASH., M'ch 9, 1897.

A. S. Kittredge, San Jose.

DEAR SIR: I enclose you to-day quit-claim deed to property herein described: Please have Mrs. Woodward sign with as little delay as possible:—*As soon as deed is returned the $1500 will be paid over to me and passed to Mrs. W.'s cr. in bank—assure Mrs. W. the matter will be settled so no personal liability will attach to her.*

Very truly, O. KNOX.

And, believing that the said proposition and offer would be carried out in good faith and believing that her title and the
66 title of the said estate to said premises was nominal only, and that the real title thereto had already passed to the defendants, and being in great mental distress on account of her necessitous condition, ill health and great age, and being persuaded and induced thereto by the representations and statements aforesaid, the plaintiff Sarah Woodward for herself and acting as sole executrix of said estate, returned said deed to her said agent to be delivered to the said McConnaughey upon the immediate payment of the sum of fifteen hundred dollars ($1500) net, and the assumption of all liens and claims against said premises of whatsoever kind.

X.

That the agency conferred upon the said Knox for the purpose of receiving and delivering said quit-claim deed was an express agency, and said Knox was expressly limited and authorized to deliver said deed upon the condition of the immediate payment to him of the said sum of fifteen hundred dollars ($1500), without any deduction whatsoever for any purpose whatsoever; and in addition thereto, the assumption by the grantee of all liens or claims whatsoever upon said premises. That at no time thereafter did said Sarah Woodward, either in her individual or assumed capacity as sole executrix of said estate, change or modify the agency of said Knox; but that, contrary to the terms of said agency, and without any authority whatsoever, the said Knox did on the 21st day of

June, 1897, deliver said deed to said McConnaughey for a sum much less than the sum of fifteen hundred dollars ($1500), to-wit, the sum of three hundred and fifty dollars ($350).

XI.

That at the time when the said offer was made and accepted, said premises were reasonably worth the sum of forty thousand dollars ($40,000) and were capable of producing and did produce a large revenue in the way of rents and profits, the exact amount thereof being to plaintiffs at this time unknown, but amounting, as plaintiffs are informed and believe, to the sum of four hundred dollars ($400) per month; but owing to the absence of said Sarah Woodward from the State of Washington and of her inability to
67 obtain other information, and of her confidence and reliance in and upon the said Knox, she was ignorant of the true value and producing capacity of said premises at said time; but she believed the representations made to her as to the value thereof, and believed that she and the estate for which she was acting had wholly lost all interest in said premises, and that the real title thereto had already vested in the defendants; that she did not discover any of said facts until on or about the 1st day of December 1899.

XII.

Plaintiffs allege that the defendants acting through their said agent J. W. McConnaughey, combined to defraud these plaintiffs of said premises, and did intentionally mislead the said Sarah Woodward through her said agent to believe that the title to said premises had been irrevocably lost; and that only a nominal title remained outstanding and that the value of said premises was very much less than the actual value thereof, to-wit, thirty-eight thousand five hundred dollars ($38,500) less than the value thereof; and plaintiffs allege that said defendants well knew the value of said premises at said time, and well knew that they were defrauding these plaintiffs of said premises, and that they did not then believe, nor do they now believe that said tax deed was irrevocable and that the title to said premises had been totally lost to plaintiffs, on account thereof; and plaintiffs allege that said J. W. McConnaughey has boasted of his success in having defrauded these plaintiffs of said premises, and has shown in many ways that he was fully cognizant of the great fraud which he committed against these plaintiffs; and that he well knew and well knows that without the said quit-claim deed, his title to said premises and the title of his assigns thereto would be absolutely valueless.

XIII.

That the said quit-claim deed was made in the name of the defendant, D. F. McConnaughey, for the benefit of himself, and as trustee for said H. C. Taylor and J. W. McConnaughey, and there-

after, the said D. F. McConnaughey conveyed said premises to the defendant C. K. McConnaughey; that said defendant C. K. McConnaughey was not a purchaser of said premises for a valuable consideration, or any consideration at all, but that he is and was
68 acting solely as a trustee, under said conveyance for said defendants, H. C. Taylor, and wife, J. W. McConnaughey and D. F. McConnaughey.

XIV.

That heretofore, to-wit, on the 1st day of March, 1901, at the hour of 10:30 o'clock a. m., of said day at his office, No. 819 Second avenue, in the city of Seattle, State of Washington, before the beginning of this action, plaintiffs, not admitting, however, the right of defendants thereto, tendered in gold coin of the United States, to the defendant H. C. Taylor, for himself, and as agent for J. W. McConnaughey and D. F. McConnaughey, and any and all persons having or claiming any interest with him under and by virtue of the said quit-claim deed, the sum of seven hundred dollars ($700) with interest thereon from the 22nd day of April, 1897, at the rate of 7 per cent. per annum, and also the sum of eight hundred dollars ($800) with interest thereon, from the 22nd day of May, 1897, at said rate; the said sums being the various amounts which the said defendants claim to have paid to the said Oscar Knox, as the agent of plaintiffs, on account of said quit-claim deed; and said tender, and each and every part thereof was refused; that said Taylor made no objection at said time to the amount or manner of said tender in any respect whatever, but declined the same, and each and every part thereof, absolutely; that said Taylor admitted at said time that he was the owner jointly with the defendants D. F. McConnaughey and J. W. McConnaughey of the claim of title under the said quit-claim deed, and that he was the agent for the said McConnaugheys, under said claim, and plaintiffs aver that they are ready and willing to repay to said defendants, all or any sum or sums paid by said defendants, or which it may appear said defendants are in equity entitled to receive from these plaintiffs, on account of any payments made by them to said Knox or otherwise, on account of said quit-claim deed.

Third Cause of Action.

And for a third cause of action and complaint, plaintiffs allege as follows to-wit:

I.

Plaintiffs allege and reaffirm all the allegations, matters
69 and things set forth in the first and second causes of action of this complaint, and the same and each and every part thereof is made a part of this cause of action in all respects as therein set out, as fully as if the same were here reiterated and set forth.

II.

That at the time of the making of said quit-claim deed, a certain action for the foreclosure of certain mechanics' liens upon said premises was pending in the above entitled court, wherein one A. S. Kerry, was plaintiff, and Gustave Winehill and others, including plaintiff Sarah Woodward in her personal capacity, and also as representing said estate, were defendants; that said cause was numbered 19,807 among the records of the clerk of said court; and on or about the 29th day of April, 1897, after the making of said quit-claim deed but before the same was delivered to the defendants, judgment was rendered in favor of said Kerry, for the sum of five hundred and twenty-three and ninety-four one-hundredths dollars ($523.94), and said judgment for said sum, thereupon became a lien upon the said described premises, as provided by the laws of the State of Washington, in such cases. But plaintiffs allege that whatever liability attached to said Sarah Woodward, or to said estate, or to said premises, on account of said judgment or of the claims upon which the same was based, was assumed by the defendants as a part of the consideration for the making of said deed; and that contrary to said agreement and in violation thereof, said defendants did not pay said judgment, or any part thereof, but they allowed the same to remain as a lien on said premises, and to stand as a liability against said Sarah Woodward and said estate for a long time thereafter, to-wit, until the 5th day of April, 1899.

III.

That on or about the 2nd day of April, 1898, the defendants herein by and through the defendant, J. W. McConnaughey, paid to said Kerry and his wife, the sum of five hundred dollars ($500), in gold coin, in consideration of which said Kerry and wife, at the request of said McConnaughey made an assignment of said judgment
70 in writing, to one Isabel C. Jones; but plaintiffs allege that in truth and in fact, the said Isabel C. Jones was not a purchaser of said judgment in her own behalf, or at all; and that the consideration of said assignment was not paid by her, but that said assignment was in reality taken in the name of said Isabel C. Jones, as a trustee for the defendants herein; and plaintiffs further allege that the money so paid to said Kerry and wife, belonged to these plaintiffs, and that the same constituted a part of the fifteen hundred dollars ($1500) agreed to be paid by said defendants in consideration of the quit-claim deed hereinbefore referred to; but which said defendants wrongfully withheld from plaintiffs, and therefore wrongfully applied to purchase said judgment.

IV.

That on or about the 24th day of February, 1898, a writ of execution was issued on said judgment and delivered to the sheriff of said

county of King, and said sheriff thereupon gave due notice of a sale of said premises under said execution; and thereafter, on or about the 9th day of April, 1898, the defendants caused said premises to be bid in, at said execution sale, in the name of said Isabel C. Jones, for the nominal sum of five hundred dollars ($500); but plaintiffs allege that said Isabel C. Jones was not a purchaser of said premises at said execution sale, for a valuable consideration, or any consideration at all, but that said premises were so bid in, in the name of said Jones as a pretended trustee for the defendants herein; and that the said Jones took and held the legal title to said premises for such purpose only; and plaintiffs further allege that no actual consideration passed at said time from said Jones or from any of the defendants, but that a pretended credit of said sum of five hundred dollars ($500) was made upon said judgment, upon the return of said sheriff; the sole and only actual consideration at any time, passing from any person to the judgment creditor, being the said sum of five hundred dollars ($500) originally paid by said J. W. McConnaughey to said Kerry and wife out of funds belonging to these plaintiffs.

V.

That thereafter, to-wit, on the 13th day of December, 1898,
71 said Isabel C. Jones, by an instrument in writing duly assigned all her interest in said judgment, and in said premises, under and by virtue of said execution sale, to the defendant D. F. McConnaughey.

VI.

That thereafter, on the 24th day of April, 1899, the defendant, J. W. Connaughey, assuming to act for himself, and as agent for the other defendants herein, applied to the sheriff of King county for a deed to said premises under said execution sale; and said sheriff thereupon issued a deed to said defendant, D. F. McConnaughey, purporting to convey said premises to him, under and by virtue of the proceedings under said writ of execution; and said deed was filed for record on the 23rd of March, 1900, and was recorded at page 217 of volume 238 of Deed Records in the office of the auditor of said King county.

VII.

That at all the times in this cause of action mentioned, plaintiffs had no knowledge of the facts hereinbefore alleged as to the true character of the claim of defendants, under said pretended tax proceedings and of the misrepresentations, fraud, collusive conduct, and other acts by which plaintiffs were induced to make said quit-claim deed; and plaintiffs were advised and believed that they had lost their title in said premises, and that the defendants had assumed all and every lien, claim, or other liability against said premises; including said judgment: and that plaintiffs were freed from all and every personal liability on account thereof; and plaintiffs did not come

to the knowledge of any of the facts regarding said judgment, assignment, execution sale, and wrongful appropriation of said moneys, until on or about the 15th day of April, 1900.

VIII.

That by virtue of all the matters and things in this cause of action set forth, the defendant D. F. McConnaughey became and is a trustee for these plaintiffs under said judgment, and the assignment thereof, and under the sheriff's sale, and the sheriff's deed, made and issued thereunder, and whatever rights in said premises, if any he have therein and thereunder, are wholly in trust for these plain-
72 tiffs and heretofore, before the beginning of this action, plaintiffs demanded of said McConnaughey that he perform said trust and convey to plaintiffs all the right, title or interest, which he possesses or claims for himself and the other defendants, under the said judgment, assignment, sale and deed; and that said demand was refused.

IX.

That heretofore, to-wit, on the first day of March, 1901, at the hour of 10:30 o'clock a. m. of said day, at his office number 819 Second avenue, in the city of Seattle, State of Washington and before the beginning of this action, plaintiffs, not admitting the right of defendants thereto, tendered in gold coin of the United States to the defendant H. C. Taylor for himself, and as agent for J. W. McConnaughey, D. F. McConnaughey, C. K. McConnaughey and any and all persons having or claiming any interest with him under and by virtue of any of the proceedings in this cause of action set forth, the sum of five hundred dollars ($500), with interest thereon at the rate of 7 per cent. per annum from the 13th day of December, 1898; and said tender, and each and every part thereof, was refused; that said Taylor made no objection at said time to the amount or manner of said tender in any respect whatever, but declined the same, and each and every part thereof absolutely; that said Taylor admitted at said time, that he was the owner jointly with the defendants, D. F. McConnaughey and J. W. McConnaughey of the claim of title to said premises, under the proceedings in this cause of action set forth; and plaintiffs aver that they are willing and ready to pay the said defendants the said sum of five hundred dollars ($500) with interest thereon from the 13th day of December, 1898, together with any and all sums which may be found to have been justly paid by said defendants on account of any of the proceedings in this cause of action set forth.

Fourth Cause of Action.

And for a fourth cause of action and complaint, plaintiff's allege as follows, to-wit:

I.

That plaintiffs are the owner- in fee simple of the following
73 described premises in the county of King, State of Washington, to-wit, lot eight (8), block eleven (11) Maynard's plat of the town (now city) of Seattle, State of Washington.

II.

That the defendants did, on or about the 13th day of February, 1897, without the consent of these plaintiffs and against their will, enter into and take forcible and wrongful possession of said premises, from said defendants, and they have refused, and now refuse, to deliver to plaintiffs the possession thereof.

III.

That the defendants have collected and received from the said premises as rents and profits since the 13th day of February, 1897, a sum varying from four hundred dollars ($400) to six hundred dollars ($600) per month for each and every month since that date, amounting to a total sum of between seventeen thousand dollars ($17,000) and twenty-three thousand dollars ($23,000); and that all rents and profits — so collected wrongfully and without the authority of plaintiffs, and plaintiffs were and are thereby damaged in a total sum varying from seventeen thousand dollars ($17,000) to twenty three thousand dollars ($23,000), and plaintiffs further allege that they are unable to ascertain the exact amount of the rents and profits received by said defendant from said premises as aforesaid, and that the same can only be ascertained by requiring an accounting thereof by the said defendant; and plaintiff demanded an accounting from said defendants and each of them as aforesaid.

IV.

That plaintiffs have been damaged by said defendants on account of said wrongful acts in the sum of twenty-three thousand dollars ($23,000).

Wherefore plaintiffs pray judgment against the defendants as follows, towit:

1. That the pretended tax deed to said defendant, H. C. Taylor, referred to in the first cause of action of this complaint be cancelled, set aside and declared null and void and of no effect; and that the tax proceedings in the complaint referred to, in so far as they
74 purport to affect the premises hereinbefore described be declared null and void.

2. That the quit-claim deed to D. F. McConnaughey mentioned in the second cause of action be rescinded, cancelled set aside and declared null and void.

3. That the defendant, D. F. McConnaughey, and all others claiming an interest with him under and by virtue of the proceedings referred to in the third cause of action, be declared a trustee for these plaintiffs and that he be required to convey to plaintiffs, by a good and sufficient conveyance, all the interest held or claimed by him on his own behalf, or otherwise, in and to the premises described in the complaint.

4. That the deed of the defendant, D. F. McConnaughey to the defendant C. K. McConnaughey in the second cause of action referred to, be declared to be of no effect, and that the same be cancelled and removed as a cloud upon the title of these plaintiffs in and to the premises hereinbefore described.

5. That the defendants, and each of them, be required to render an accounting as set forth under the fourth cause of action showing the amount of all moneys received by them or either of them as rents and profits from said described premises; and for a personal judgment against said defendants, and each of them, for the sum which may be found to be due to plaintiffs, from the defendants, as rents and profits during the occupancy of said premises.

6. For an order forever quieting the title to said premises in these plaintiffs, and putting plaintiffs in possession of said premises.

7. Also for the costs and disbursements of plaintiffs herein, and for such other and further relief as to the court shall seem equitable and just.

T. O. ABBOTT,
Attorney for Plaintiffs, Rooms 408, 410,
Equitable Bldg., Tacoma, Washington.

75 STATE OF WASHINGTON, } ss.:
County of Pierce, }

I, T. O. Abbott, being first duly sworn, do on oath depose and say that I am the attorney for the plaintiffs in the above entitled action; that I have read the foregoing complaint, know the contents thereof, and believe the same to be true; that the reason I make this affidavit is, that the material facts stated in said complaint are within my personal knowledge.

T. O ABBOTT.

Subscribed and sworn to before me this 29th day of November, 1901.

F. H. MURRAY,
[SEAL.] Notary Public, Residing at Tacoma,
Pierce County, Washington.

EXHIBIT "A."

In the name of the Most Merciful God, Amen:

I, Henry S. Woodward, of the city of Seattle, county of King and Territory of Washington, being above the age of twenty-one (21) years, and being of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whomsoever, do make, publish, and declare this my last will and testament, in manner following, that is to say:

I.

I direct that my body be decently buried, with proper regard for my station and condition in life and the circumstances of my estate.

II.

I direct that my executors hereinafter named, to-wit, Sarah Woodward, George D. Snow, and Josephus Rickey, as soon as they have sufficient fund- in their hands, pay my funeral expenses and the expenses of my last illness, and all debts, claims, dues, demands and charges properly chargeable against my estate of every name and n-ture whatsoever.

76 III.

I give, bequeath, and devise unto my said executors, the said Sarah Woodward, George D. Snow and Josephus Rickey, all the rest, residue and remainder whatsoever of my estate, money and property of every name and nature whatsoever and wheresoever situate, real, personal and mixed, of which I shall die seized, possessed, or in any manner whatsoever interested in or entitled to, in trust, nevertheless, and to and for the following trusts, uses and purposes to-wit:

First. In trust to sell and dispose of my real and personal property at such times and in such quantities and to such persons and for such prices as they, my said executors, shall see fit and deem for the best interests of my estate to invest all moneys belonging to my estate, which shall come into their hands, in such manner as they shall see fit and deem for the best interests of my estate, and to reinvest the same from time to time and keep the same invested in such manner as they shall see fit and deem for the best interests of my estate, or they may keep the whole or any part thereof at interest in such manner as they shall see fit and deem for the best interests of my estate; hereby giving and granting unto my said executors full and ample power and authority to do and perform every act and thing whatsoever requisite and necessary in and about the premises as they shall see fit and deem for the best interests of my estate, to all intents and purposes whatsoever without question,

let or hindrance whatsoever; they may sell my real and personal estate as hereinabove provided, and they may buy and sell real and personal property from time to time as they shall see fit and deem for the best interests of my estate, taking the title in their own names or in the name of any one or more of them, or in the name or names of any other person or persons whomsoever as they may see fit from time to time, with full power and ample authority as aforesaid.

Secondly. During the lifetime of my beloved wife, the said Sarah Woodward, the rents, issues and profits of all real estate, and the interest of all moneys kept at interest, and all profits whatsoever in any manner whatsoever arising out of my estate, shall go to the said Sarah Woodward, and be and become her property, absolutely, and shall be paid, set apart, and delivered over to her annually
77 on the first of January in each and every year, and as much oftener as she shall demand the same.

Thirdly. Should such rents, issues and profits of real estate, interest of moneys, and profits arising out of my estate as hereinabove provided, together with her other income from all other sources, prove inadequate for the support and maintenance of the said Sarah Woodward, then and in each and every such case she and her coexecutors shall appropriate, set apart and deliver to her, the said Sarah Woodward, from time to time, out of my estate, such moneys and property available, ample and necessary for her support and maintenance, to the end that she shall always be supplied with all the necessaries and comforts of life in an ample, abundant and liberal manner, and she herself shall be the exclusive judge as to what is or may from time to time be necessary for her support, maintenance and comfort, and my said executors shall pay over to her and set apart and deliver to her on her demand, from time to time, all moneys and property which she shall or may from time to time so demand, paid over, set apart, and delivered to her as hereby contemplated shall be and remain her own property absolutely and no account of the same shall ever be demanded or exacted from her, and her coexecutors shall make and execute and deliver unto her such conveyances, bills of sale, and assurances as may be requisite and necessary to carry out this branch of my will and such conveyances bills of sale and assurances made by her coexecutors shall be ample to convey title to all property, real and personal, so demanded by her as hereby contemplated, including money whenever so demanded.

Fourthly. On the death of the said Sarah Woodward, or on my own death, in case I survive her, my surviving executors, the said George D. Snow and Josephus Rickey, shall immediately close up their trusts under this will; they shall convert all my property into ready money, with all convenient, due and necessary speed, and shall as soon as they possibly can without serious injury to my estate, pay over and deliver such ready money as follows, paying the

following sums respectively to the following named persons respectively, to wit:

1. Unto Mrs. Carrie McNeely, widow, daughter of my sis-
78 ter Susan, the sum of one thousand dollars ($1,000.00).

2. Unto Mrs. Sarah Whitlatch, wife of Daniel Whitelatch of Ione City, Amador county, California, the sum of one thousand dollars, ($1,000.00)

3. Unto my niece, Mrs. Josephus Rickey, daughter of my sister Caroline, of San Diego, California, the sum of one thousand dollars ($1,000.00).

4. Unto Caroline Victoria Lithgow, daughter of my said sister Caroline of San Diego, California, the sum of one thousand dollars ($1,000.00).

5. Unto Ella McNeeley, daughter of my niece, Mrs. Carrie McNeeley, of Reno, Nevada, the sum of five hundred dollars ($500.00).

6. Unto Effie McNeeley, daughter of my said niece Mrs. Carrie McNeeley, of Reno, Nevada, the sum of five hundred dollars ($500.00).

7. Unto Ettie McNeeley, daughter of my said niece Mrs. Carrie McNeeley, of Reno, Nevada, the sum of five hundred dollars ($500.00).

8. Unto Jessie Rickey, daughter of my said niece Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00)

9. Unto Mary Rickey, daughter of my said niece, Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00)

10. Unto Hettie Rickey, daughter of my said niece Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

11. Unto Elva Rickey, daughter of my said niece, Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars, ($500.00).

12. Unto my niece, Georgie Desmond, daughte of my brother Ebenezer of San Diego, California, the sum of five hundred dollars ($500.00).

13. Unto Mrs. Eliza Woodward, widow of my brother, Arnold, of San Diego, California, the sum of five hundred dollars ($500.00).

14. Unto my niece, Emma, daughter of my said brother Arnold, of The Dalles, Oregon, the sum of five hundred dollars ($500.00).

15. Unto my niece, Melvin Mathews, wife of William Mathews, of Humboldt county, California, the sum of five hundred dollars ($500.00).

79 16. Unto Henry Rickey, son of my said niece Mrs. Josephus Rickey of San Diego, California, the sum of one thousand dollars ($1,000.00).

17. Unto Frederick Rickey, son of my said niece Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

18. Unto Earnest Rickey, son of my said niece Mrs. Josephus Rickey, of San Diego, California, the sum of five hundred dollars ($500.00).

19. Unto Susie, daughter of my niece Mrs. Sarah Whitelatch, the sum of five hundred dollars ($500.00).

20. Unto Lula, daughter of my said niece Mrs. Sarah Whitlatch, the sum of five hundred dollars ($500.00).

21. Unto Bertha, daughter of my said niece, Mrs. Sarah Whitelatch, the sum of five hundred dollars ($500.00).

22. In case my estate shall be more than sufficient to pay all the charges upon the same the said several sums of money hereinbefore mentioned in the nature of legacies, I direct that the said several legacies be increased pro rata; or if my said estate shall be insufficient, then such legacies shall be decreased pro rata so as to absorb my entire estate in either case.

IV.

I have no separate estate; my entire estate consists of my half of the community property of myself and my said beloved wife, Sarah Woodward.

V.

I do hereby make, nominate constitute and appoint my beloved wife, Sarah Woodward of the city of Seattle county of King, Territory of Washington, and my trusted friend, the said George D. Snow, of the said city of Seattle, county and Territory aforesaid, and my beloved nephew, the said Josephus Rickey, of the city of San Diego, county of San Diego, and State of California, to be executors of this my last will and testament to serve without bonds.

VI.

I direct and it is my will, that my said executors proceed
80 to settle up and close up all my business and affairs, and to execute this my last will and testament in the manner provided herein without bonds and without letters testamentary, and without the interference whatsoever of the probate or any other court, board or person whomsoever, merely to admit this my last will and testament to probate in the manner provided by law, and to grant certificate of probate thereof, and record the same and grant certificate of such record, and that is all that any court, board or person whomsoever save only my said executors shall have to do with my estate or the execution of this my last will and testament.

VII.

And I hereby revoke all former wills by me made.

In testimony whereof I have hereunto set my hand and seal this 10th day of April, A. D. 1888.

HENRY S. WOODWARD. [SEAL.]

The foregoing instrument, consisting of ten (10) pages besides this, was at the date thereof, by the said Henry S. Woodward, the testators named, signed and sealed and published as and declared to be his last will and testament in presence of us, who, at his request and in his presence, and in the presence of each other have subscribed our names as witnesses thereto.

WILLIAM W. POOLE,
Residing at Seattle, King County, Washington Territory.
JAMES W. HUGHES,
Residing at Seattle, King County, Washington Territory.

Filed Oct. 17, 1892.
W. B. SPENCER, Clerk.

Whereas, I, Henry S. Woodward, of the city of Seattle, King county, State of Washington, did, on the 10th day of April, A. D. 1888, make my last will and testament of that date:

Now, I, the said Henry S. Woodward, do hereby declare this to be a codicil to the same.

I do hereby ratify and confirm the said will in every respect, save in so far as any part of it is inconsistent with this codicil.

81 Unto my niece Georgie Desmond, daughter of my brother Ebenezer of San Diego, California, I direct that the sum of one dollar ($1.00) shall be paid instead of the sum of five hundred ($500.00) dollars named in the will.

Unto Earnest Rickey, son of my said niece Mrs. Josephus Rickey of San Diego, California, I direct that the sum of one dollar ($1.00) shall be paid instead of the sum of five hundred — ($500.00) named in said will.

I hereby revoke the appointment of George D. Snow of the city of Seattle, county of King, State of Washington, and I declare it to be my will that in place and stead of the said George D. Snow, Edward Von Tobel of the city of Seattle in said King county, State of Washington, be one of the executors of my said last will and testament.

I declare it to be my will that Sarah Woodward and the said Edward Von Tobel be the sole executors of my said last will and testament, and to that end, I hereby revoke the appointment of Josephus Rickey named in said will as an executor thereof.

I further give and bequeath and direct my executors to pay to each of my heirs at law not named in said will the sum of — ($1.00) dollar.

In witness whereof, I have hereunto set my hand and seal this sixth day of February, A. D. 1891.

HENRY S. WOODWARD. [SEAL.]

The above last written and foregoing instrument consisting of one page besides this, was, at the date thereof, by the said Henry S. Woodward signed and sealed and published as and declared to be a codicil to his last will and testament in presence of us who at his re-

quest and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

JOHN COMEY,
Residing at 1428 Sixth St., Seattle, Washington.
MARTIN COPMANN,
Residing at 1420 6th St., Seattle, King County, Washington.
ALICE E. VON TOBEL,
Residing at 1420 6th St., Seattle, Washington.

Whereas, I, Henry S. Woodward, of the city of Seattle, King county, Washington, did, on the 10th day of April, A. D. 1888, make my last will and testament of that date; and whereas on the
82 6th day of February, A. D. 1891, I made a codicil of that date and annexed it to my said last will and testament:

Now, I, Henry S. Woodward, do hereby declare this to be a second codicil to my last will and testament, and it is my will that this writing be thereto annexed and made a part of the same.

I do hereby ratify and confirm the said will and codicil in every respect save and except so far as any part of the said will or codicil is inconsistent with this codicil.

Unto my neice Mrs. Josephus Rickey, daughter of my sister Caroline, of San Diego, California, I direct that the sum of one hundred dollars ($100.00) shall be paid instead of the sum of one thousand dollars ($1,000.00) as named in my will.

Unto Elva Rickey, daughter of my said niece, Mrs. Josephus Rickey of San Diego, California, I direct that the sum of one dollar ($1.00) shall be paid instead of the sum of five hundred dollars ($500.00) as named in my said will.

Unto my niece Emma Woodward, daughter of my brother Arnold of The Dalles, Oregon, I direct that the sum of one dollar ($1.00) be paid instead of the sum of five hundred ($500.00) named in my said will.

Unto Henry Rickey, son of my niece Mrs. Josephus Rickey of San Diego, California, I direct that the sum of one dollar ($1.00) shall be paid instead of the sum of one thousand dollars (1,000.00) as named in my said will.

Unto Carrie Sayer, daughter of my said sister Louise Sweeney of Erie county, Pennsylvania, I direct that the sum of five hundred dollars ($500.00) shall be paid.

Unto the youngest daughter of my brother William Woodward, the name of said daughter being unknown to me at this time, of Erie county, Pennsylvania, I direct that the sum of five hundred dollars ($500.00) be paid.

In witness whereof I have hereunto set my hand and seal this fifteenth day of June, A. D. 1891.

HENRY S. WOODWARD. [SEAL.]

83 The foregoing last written instrument, consisting of two pages besides this, was at the date thereof, by the said Henry

S. Woodward signed and sealed, and published as and declared to be a codicil to his last will and testament in presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

JOHN CORNEY,
Residing at Seattle, Wash.
J. S. LORRAINE,
Residing at Seattle, Washington.
MARTIN COPMANN,
Residing at Seattle, Washington.

STATE OF WASHINGTON, } ss:
County of King, }

L. H. Wheeler, being first duly sworn, says: I served the foregoing second amended complaint on R. S. Jones, attorney for defendants on the 30th day of November, 1901, by delivering at and leaving on his office desk in his office in a conspicuous place a copy thereof, in Colman building in Seattle, Washington.

L. W. WHEELER.

Subscribed and sworn to before me this 30th day of November, 1901.

E. B. HERALD,
Notary Public.

Filed Nov. 30, 1901.
C. A. KOEPFLI, Clerk.

84 In the Superior Court of the State of Washington in and for the County of King.

SARAH WOODWARD ET AL., Plaintiffs,
vs.
H. C. TAYLOR ET AL., Defendants. } No. 31864. Demurrer.

Come now the defendants H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, in the above entitled action and appearing jointly to the second amended complaint heretofore served in this action, demur to said 2nd amended complaint upon the grounds and for the reasons following, to-wit:

I.

That several cause- of action have been improperly united.

II.

That the second amended complaint does not state facts sufficient to constitute a cause of action against these defendants or against either of them.

III.

That this action has not been commenced within the time limited by law.

Further demurring to said second amended complaint of plaintiff in this action these defendants demur to the first cause of action therein set forth upon the grounds and for the reasons following to-wit:

I.

That several causes of action have been improperly united.

II.

That the said first cause of action in said second amended complaint does not state facts sufficient to constitute a cause of action against these defendants, or against either of them.

III.

That this action has not been commenced within the time limited by law.

85 Further demurring to said second amended complaint of plaintiff in this action these defendants demur to the second cause of action therein set forth upon the grounds and for the reasons following, to-wit:

I.

That several causes of action have been improperly united.

II.

That the said second cause of action in said second amended complaint does not state facts sufficient to constitute a cause of action against these defendants, or against either of them.

III.

That this action has not been commenced within the time limited by law.

Further demurring to said second amended complaint of plaintiff in this action these defendants demur to the third cause of action therein set forth upon the grounds and for the reasons following, to-wit:

I.

That several causes of action have been improperly united.

II.

That the said third cause of action in said second amended complaint does not state facts sufficient to constitute a cause of action against these defendants, or against either of them.

III.

That this action has not been commenced within the time limited by law.

Further demurring to said second amended complaint of plaintiff in this action these defendants demur to the fourth cause of action therein set forth upon the grounds and for the reasons following, to-wit:

I.

That several causes of action have been improperly united.

II.

That the said fourth cause of action in said second amended complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

86

III.

That this action has not been commenced within the time limited by law.

Respectfully submitted,
R. S. JONES,
Attorney for Defendants H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey.

Filed Dec. 3, 1901.
C. A. KOEPFLI, Clerk.

In the Superior Court of the State of Washington for King County.

SARAH WOODWARD ET AL., Plaintiffs, vs. H. C. TAYLOR ET AL., Defendants.	No. 31864. Order Overruling Demurrer of H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey.

The above entitled matter coming on to be heard on this, Saturday, the 14th day of December, A. D. 1901, upon the demurrer of the defendant- H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, to the second amended complaint of the plaintiff- herein, all parties appearing, argument being had, and the court being fully advised in the premises, it is hereby or-

dered and directed that the demurrer of the said H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, to the first cause of action set forth in said second amended complaint be and the same is hereby overruled and the said defendants, H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey object to such ruling and are hereby allowed and exception thereto.

It is further ordered and directed that the demurrer of the said defendants, H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, to the second cause of action set forth in said amended complaint be and the same is hereby overruled and the said defendants, H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey object to such ruling and are hereby allowed an exception thereto.

87 It is further ordered and directed that the demurrer of the said defendants H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey to the third cause of action set forth in said amended complaint be and the same is hereby overruled and the said defendants H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey object to such ruling and are hereby allowed an exception thereto.

It is further ordered and directed that the demurrer of the said defendants, H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey to the fourth cause of action set forth in said amended complaint be and the same is hereby overruled, and the said defendants H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, object to such ruling and are hereby allowed an exception thereto.

And it is further ordered and directed that the demurrer of the defendants, H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey to the said second amended complaint be and the same is in all things overruled and the said H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, objecting thereto are hereby allowed an exception.

And it is further ordered and directed that the said defendants have twenty days in which to further plead to said second amended complaint.

ARTHUR E. GRIFFIN, Judge.

Filed Dec. 17, 1901.

C. A. KOEPFLI, Clerk.

88 In the Superior Court of the State of Washington for King County, Department No. 1.

SARAH WOODWARD ET AL., Plaintiffs,
vs.
H. C. TAYLOR ET AL., Defendants.
} No. 31864.

Answer of H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants.

Come now the defendants, H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, and answering the second amended complaint of the plaintiffs in this action, admit, deny and allege as follows, to-wit:

I.

Answering to the first cause of action set forth in plaintiffs' second amended complaint these defendants admit, deny and allege as follows: These defendants admit all of paragraph I of such second amended complaint, and all of paragraph II thereof and all of paragraph III thereof.

II.

Answering paragraph IV of said first cause of action set forth in plaintiffs' second amended complaint, these defendants admit that Henry S. Woodward and Sarah Woodward were the owners of the tract or parcel of land therein described, deny that such ownership was in fee simple and allege the facts to be that the title of said Henry S. Woodward and Sarah Woodward to said property was as hereinafter in this answer set forth; deny that the said property contained and now contains large and valuable improvements, and deny that the same was and is capable of producing and did produce large revenues in the way of rents and profits, and allege the facts to be as hereinafter set forth.

III.

Answering paragraph V of said first cause of action set forth in plaintiffs' second amended complaint these defendants deny that plaintiffs are now and during all the times in said complaint mentioned were the lawful owners and holders of the title in fee
89 simple to said premises, deny that said plaintiffs are and were entitled to the possession thereof, admit that these defendants claim an interest, right and title in and to said premises and deny each and every other allegation in said paragraph V contained, and allege that the facts are as in this answer more fully hereinafter set forth.

IV.

Answering paragraph VI of said first cause of action of plaintiffs' second amended complaint these defendants deny each and every allegation therein contained, except that defendants admit that on or about the first day of March, A. D. 1901, at the hour of 10:30 o'clock a. m. of said day, at the office of H. C. Taylor, No. 819 Second avenue in the city of Seattle, State of Washington and before the beginning of this action plaintiff, Sarah Woodward, tendered in gold coin of the United States to the defendant, H. C. Taylor, and to the defendant H. C. Taylor only, the sum of nine thousand four hundred and thirteen and 80/100 ($9,413.80) dollars, and admit that such tender and each and every part thereof was refused. And these defendants further admit that on the same day at about the hour of 12:30 o'clock p. m. the plaintiff, Sarah Woodward caused to be tendered to the county treasurer of the county of King and State of Washington the sum of two hundred and sixty-four and 85/100 dollars ($264.85) and thereupon said county treasurer issued a temporary receipt to the person by whom said tender was made, and that thereafter, to-wit, on the 8th day of March, A. D. 1901, the said county treasurer returned the said sum to the person making the said tender and declined to issue a receipt therefor.

Further answering said second amended complaint and more particularly the second cause of action in said amended complaint set forth these defendants admit, deny and allege as follows:—

I.

These defendants deny each and every allegation contained in paragraph I of said second cause of action, except as in this answer hereinbefore admitted or explained.

II.

Answering paragraph II of plaintiffs' complaint these de-
90 fendants admit that the copy of the will of Henry S. Woodward, deceased, attached to said amended complaint as Exhibit "A" and made a part thereof is a true and perfect copy of said will, and deny each and every allegation contained in said paragraph II, except as hereinafter in this answer admitted or explained.

III.

Answering paragraph III of said second cause of action of said amended complaint these defendants admit that said premises contained extensive improvements, admit that from the 21st day of December, 1895, until the first day of December, 1897, the plaintiff, Sarah Woodward, constituted and appointed one Oscar Knox as her agent. Admit that as such agent said Knox was employed to collect rents and profits and to care for said estate, making due, truthful ample and complete returns to her of all his doings as such

agent and to collect and remit to her all the rents and profits of such estate, and that said Knox was empowered to advise her as to the condition of said estate from time to time. And these defendants deny each and every other allegation set forth in paragraph III of said second cause of action.

IV.

Answering paragraph IV of said second cause of action these defendants have no information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore deny each and every allegation in said paragraph IV contained.

V.

Answering paragraph V of said second cause of action these defendants deny that the plaintiff, Sarah Woodward became and was incompetent to understand and transact business and unable to accurately judge of the action concerning said estate: admit that Sarah Woodward was a non-resident of the State of Washington. And to each of the other allegations in said paragraph V contained these defendants have no information sufficient to form a belief in regard thereto, and therefore deny each and every other allegation in said paragraph V contained.

VI.

Answering paragraph VI of said second cause of action
91 these defendants deny each and every allegation therein contained.

VII.

Answering paragraph VII of said second cause of action these defendants deny each and every allegation therein contained, except as to any representations which the said Oscar Knox may have made to the plaintiff, Sarah Woodward, these defendants have no information in regard thereto and therefore deny the same and deny each and every allegation in said paragraph VII contained.

VIII.

Answering paragraph VIII of said cause of action these defendants deny each and every allegation therein contained, except as in this answer hereinafter explained, and allege that the facts in regard thereto are as in this answer hereinafter set forth.

IX.

Answering paragraph IX of said cause of action these defendants deny each and every allegation therein contained, except that as to any proposition in writing or representations made by O. Knox to A. S. Kittridge, or to plaintiff, Sarah Woodward, these defendants have no information in regard thereto, and therefore deny the same.

X.

These defendants deny each and every allegation set forth in paragraph X of said second cause of action.

XI.

These defendants deny each and every allegation set forth in paragraph XI of said second cause of action.

XII.

These defendants deny each and every allegation set forth in paragraph XII of said second cause of action.

XIII.

Answering paragraph XIII of said second cause of action these defendants admit that a quit-claim deed was made by Sarah Woodward as executrix of the estate of Henry S. Woodward deceased to D. F. McConnaughey and that said quit-claim deed was made
92 for the benefit of D. F. McConnaughey, H. C. Taylor and J. W. McConnaughey and that said D. F. McConnaughey thereafter conveyed said premises to defendant, C. K. McConnaughey, and that said C. K. McConnaughey accepted such conveyance as a trustee for the defendants H. C. Taylor, J. W. McConnaughey and D. F. McConnaughey. And these defendants deny each and every other allegation contained in said paragraph XIII of said second cause of action.

XIV.

These defendants admit that on or about the 1st day of March, A. D. 1901, at the office of H. C. Taylor, No. 813 Second avenue in the city of Seattle, the plaintiff, Sarah Woodward, tendered to H. C. Taylor the sum of seven hundred dollars with interest thereon from the 22nd day of April, A. D. 1897, at the rate of seven per cent. per annum also the sum of eight hundred dollars with interest thereon from the 22nd day of May, 1897, at said rate, and admit that said tender and each and every part thereof was refused; and deny each and every other allegation in said paragraph XIV of said second cause of action.

Further answering said second amended complaint of the plaintiffs in this action and more particularly the third cause of action therein set forth these defendants admit, deny and allege as follows:

I.

These defendants deny each and every allegation set forth in paragraph I of said third cause of action, except as hereinbefore admitted or explained.

II.

Answering paragraph II of said third cause of action these defendants admit that at the time of the making of said quit-claim deed a certain action for the foreclosure of certain mechanics' liens upon said premises was pending in the above entitled court wherein one A. S. Kerry was plaintiff and Gustave Weinhill and others, including plaintiff Sarah Woodward in her personal capacity and also representing said estate, were defendants; that said cause of action was numbered 19807 among the records of the clerk of this court; and deny each and every other allegation set forth in said paragraph II.

93

III.

Answering paragraph III of said third cause of action these defendants deny each and every allegation therein contained, except as hereinafter in this answer admitted or explained.

IV.

Answering paragraph IV of said third cause of action these defendants admit that an execution was issued on a judgment in favor of A. S. Kerry and against the plaintiff, Sarah Woodward in this action and other parties on or about the 24th day of February, 1898, deny that the same was issued on the judgment referred to in said third cause of action, admit that Isabel C. Jones purchased said premises at execution sale for the sum of five hundred dollars, and deny each and every other allegation in said paragraph IV contained.

V.

Answering paragraph VI of said cause of action these defendants admit that the sheriff of the county of King on or about the 24th day of April, 1899, issued to the defendant D. F. McConnaughey a deed to said premises, that said deed was filed for record on the 23rd day of March, A. D. 1900, and was recorded at page 217 of volume 238 of Deed Records, in the office of the auditor of said King county. And these defendants deny each and every allegation in said paragraph VI contained.

VI.

Answering paragraph VII of said third cause of action these defendants deny each and every allegation therein contained and allege the facts to be that all of the facts connected with said third cause of action which are in any wise true were well known to the plaintiff, Sarah Woodward and to Sarah Woodward as executrix of the estate of Henry S. Woodward deceased more than three years before the commencement of this action, and were well known to said Sarah Woodward on or before the first day of June, A. D. 1897; and

allege the facts in regard thereto are as in this answer hereinafter more fully set forth.

94 VII.

These defendants deny each and every allegation set forth in paragraph VIII of said third cause of action.

VIII.

Answering paragraph IX of said third cause of action these defendants admit that on or about the first day of March, A. D. 1901, at the hour of 10:30 o'clock a. m. of said day at the office of H. C. Taylor No. 819 Second avenue in the city of Seattle, State of Washington, and before the beginning of this action, Sarah Woodward tendered in gold coin of the United States to the defendant, H. C. Taylor, the sum of five hundred dollars with interest thereon at the rate of seven per cent. per annum from the 13th day of December, 1898, and that said tender and each and every part thereof was refused; and deny each and every other allegation in said paragraph IX in said third cause of action contained.

Further answering the second amended complaint of the plaintiffs herein and more particularly the fourth cause of action in said second amended complaint contained these defendants admit, deny and allege as follows:

I.

These defendants deny each and every allegation contained in paragraphs I, II, III and IV separately and severally in said fourth cause of action set forth.

And these defendants allege the facts to be as in this answer more fully hereinafter set forth.

These defendants further answering said second amended complaint of the plaintiffs herein and for an answer to the first cause of action, second cause of action, third cause of action and fourth cause of action in said second amended complaint contained each and severally joining said answer in this affirmative defense for the purpose of avoiding useless repetition, allege as a first affirmative defense to said second amended complaint and each of said causes of action as follows, to-wit:—

I.

That heretofore, to-wit, on or about the 25th day of May,
95 A. D. 1900, the plaintiff Sarah Woodward and Sarah Woodward as executrix of the last will and testament of Henry S. Woodward, deceased, to whose rights as executrix John H. McGraw, the plaintiff in this action, has succeeded and is privy, instituted a certain action in the circuit court of the United States for the 9th circuit of Washington northern division holding terms in the city of

Seattle, county of King, and State of Washington, against these defendants and each of them; and said court is and was a court of competent jurisdiction in said action.

II.

That said action was for the identical causes set forth as cause of action number 1, cause of action number 2, cause of action number 3 and cause of action number 4 in the complaint to which this is an answer; that the identical facts and causes of action now pleaded in the complaint to which this is an answer, were pleaded and charged in the complaint in said action in the United States circuit court, and none other.

III.

That thereafter such proceedings were had in said first cause that these defendants and each of them joined issue in said action and afterwards, to-wit, on or about the 26th day of July, 1900, a final decree was entered therein in favor of these defendants and against the said plaintiffs and it was there adjudged that the plaintiffs take nothing by their complaint but that said action be dismissed and that defendants recover of the plaintiffs the cost and disbursements in said action which were taxed at thirty ($30.00) dollars. That thereafter and on or about the 26th day of July, A. D. 1900, a writ of error was sued out from such decision to the United States circuit court of appeals for the ninth judicial circuit, a court having competent jurisdiction to hear an appeal from said decree of the circuit court of the United States for the district of Washington, northern division. That all of the proceedings in said action as are material to a determination of this defense are set forth in a transcript thereof filed and served with this answer and hereby made a part thereof as though more fully herein set forth, reference being had
96 thereto for greater certainty, and the same being marked for reference as "Exhibit "A" to answers."

IV.

That thereafter the said appeal to the United States circuit court of appeals came on regularly for hearing, argument was had and the same duly determined by said appellate court and the decree entered by the ninth judicial district, northern division, of the State of Washington, on the 26th day of July, A. D. 1900, was by a mandate of said United States circuit court of appeals in all things affirmed and became and was the final decree in said cause.

V.

That thereafter the plaintiffs in said action paid the judgment and decree so rendered and entered and said cause was fully and completely determined and terminated.

VI.

That by reason of the facts set forth in this first affirmative defense the plaintiffs herein are forever barred and estopped from proceeding further in this cause as against these defendants.

These defendants further answering the complaint of the plaintiffs in this action and answering to the first, second, third and fourth causes of action therein set forth jointly each and severally joining said causes of action in this said affirmative defense for the purpose of avoiding useless repetition, allege as a second affirmative defense to said second amended complaint and each of said causes of action as follows, to-wit:—

I.

That on or about the 13th day of February, A. D. 1897, Sarah Woodward in her own right as executrix of the estate of Henry S. Woodward deceased, held the nominal legal title to lot eight (8) in block eleven (11) of Maynard's plat of the town now city of Seattle, King county, and State of Washington, together with the appurtenances and hereditaments, but which nominal title was subject to divers and numerous clouds, encumbrances and claims among other things unpaid taxes for every year subsequent to the year
97 1890 divers and many liens in favor of mechanics and laborers filed in the county auditor's office in the county of King and State of Washington, and some of which were then being foreclosed in an action then pending in this court which action is No. 19807 of the files and records hereof, subjected to pretended leasehold interests of Gustave Weinhill and others, which leasehold interests were mortgaged and claimed to be an encumbrance upon the legal title and the mortgage-s under various mortgages from the lessees were foreclosing the same and seeking to obtain title to said property.

II.

That said property was greatly depreciated in value and was then renting for only one hundred and forty-eight dollars per month, and no more.

III.

That on or about said 13th day of February, A. D. 1897, the county treasurer of the county of King and State of Washington, made executed and delivered to H. C. Taylor, one of these defendants a tax deed in due, lawful and proper form, conveying to said H. C. Taylor lot eight (8) in block eleven (11) of Maynard's plat of the town (now city) of Seattle, which tax deed was made executed and delivered by reason of the default in the payment of taxes for the year 1891 assessed and levied by the county of King and State of Washington upon said property and for which tax deed the said defendant H. C. Taylor paid to the county treasurer of the county of King and State

of Washington the full sum of twenty-six hundred and twenty-three and 10/100 dollars ($2623.10).

IV.

That under and by virtue of such tax deed the defendant H. C. Taylor, on or about the 13th day of February, 1897, entered upon and took possession of said above described premises and began collecting the rents thereof.

V.

That all the acts of H. C. Taylor in this answer described were done by himself or by J. W. McConnaughey acting for him
98 and were all done in the interests of H. C. Taylor, J. W. McConnaughey and D. F. McConnaughey, defendants herein, joint owners of said property.

VI.

That there were prior to said 13th day of February, 1897, on file in the county auditor's office in the county of King and State of Washington, mechanics' and laborers' liens constituting valid liens upon said above described property in the total sum or value of about fifteen thousand dollars and an action was then pending known as cause No. 19807 in the superior court of this county, in which James W. Shehan and others were plaintiffs and Sarah Woodward and Sarah Woodward as executrix of the estate of Henry S. Woodward deceased together with other parties were defendants, which actions were for the purpose of foreclosing ten of said mechanics' and laborers' liens.

VII.

That H. C. Taylor was on the 13th day of February, A. D. 1897, and ever since has been the owner of said real property, its hereditaments and appurtenances, in trust, however, as herein set forth for the interests of H. C. Taylor, J. W. McConnaughey and D. F. McConnaughey.

VIII.

That under the laws of the State of Washington plaintiffs had a period of one year previous to the making and delivery of said tax deed in which to redeem said real property from the tax sale under which such deed was issued and after such year of redemption had expired Sarah Woodward as executrix of the estate of Henry S. Woodward, deceased, requested further time from these defendants in which to redeem said property, and such time was by these defendants granted, and continued from time to time in a spirit of generosity and kindness to said plaintiffs until these defendants were informed by Sarah Woodward that it was impossible for her in her own capacity or as executrix to redeem the said property and

impossible to tender to or repay the defendant the money paid for taxes on said property as provided by the laws of the State of Washington. That in said month of February, A. D. 1897, and long previous thereto and until the month of December, A. D. 1897,
Oscar Knox was the agent and attorney in fact of Sarah
99 Woodward and of Sarah Woodward as executrix of the estate
of Henry S. Woodward deceased, having a general power of attorney authorizing him, the said Oscar Knox, to do each and every act which the said Sarah Woodward or Sarah Woodward as executrix could in any wise do in regard to said real property, its hereditaments and appurtenances, to mortgage and sell the same, make conveyances thereof and in every way to act for the said Sarah Woodward in and about the premises.

IX.

That in said month of February, 1897, and for a long time previous thereto and continuously thereafter until the month of December, 1897, Frank P. Lewis, an attorney at law, of good repute and in legal standing at the bar of this State and of this court, was the general attorney at law of Sarah Woodward and of Sarah Woodward as executrix of the estate of Henry S. Woodward, deceased.

X.

That in said month of February, A. D. 1897, and for a long time previous thereto and for a long time thereafter the exact limit of which is to these defendants unknown, A. S. Kittredge, an attorney at law of good repute and legal standing at the bar of the State of California, and residing at San Jose, California, where Sarah Woodward then resided, was the general attorney and counsel of said Sarah Woodward in her own capacity and as said executrix and Frank P. Lewis and Oscar Knox, above named, were personally by the said Sarah Woodward directed to conduct all of her business of every kind, nature and description through her attorney, the said A. S. Kittredge and the firm of Kitteredge & Craft, of which the said A. S. Kitteredge was a member.

XI.

That during the months of February and March, A. D. 1897, the said Oscar Knox and the said Frank P. Lewis approached the defendant, J. W. McConnaughey and informed the said McConnaughey that the said Sarah Woodward in her individual capacity and as executrix was absolutely unable in any manner to obtain money necessary to clear the title to said real property, was unable to obtain the money to make a tender to the defendants or to H. C. Taylor of the amount by the said Taylor paid for taxes upon the
100 said property, and that the said Sarah Woodward desired to
sell to said J. W. McConnaughey and his co-owners all the right, title and interests of Sarah Woodward and Sarah Woodward

as executrix of the estate of Henry S. Woodward deceased, in and to said real property and after various propositions on the part of said Knox and said Lewis it was agreed between the said Knox and said Lewis on behalf of said Sarah Woodward and Sarah Woodward as executrix and the said J. W. McConnaughey on behalf of himself and his co-owners that Sarah Woodward for herself and as executrix of the last will and testament of H. S. Woodward, deceased, would convey to D. F. McConnaughey, in trust for these defendants, all the right, title and interest of the said Sarah Woodward and Sarah Woodward as executrix, in and to said real property for the sum of fifteen hundred dollars, of which sum seven hundred dollars was to be paid in cash to said Oscar Knox for the benefit of his principal, the said Sarah Woodward, and eight hundred dollars was to be deposited in escrow with the Washington National Bank of Seattle, which agreement so to sell was in writing and a copy of the same is hereto attached and made a part of this answer as though more fully herein set forth and is marked "Exhibit B to Answers," reference being had thereto for greater certainly.

XII.

That in pursuance of said agreement there was delivered into escrow with the Washington National Bank of Seattle on the 22nd day of April, A. D. 1897, the deed to said real property made, executed and delivered by Sarah Woodward for herself and as executrix of the last will and testament of Henry S. Woodward, deceased, which is the deed referred to in plaintiffs' complaint; that said deed was delivered to Frank P. Lewis by A. S. Kitteredge as the attorney of Sarah Woodward and Sarah Woodward as executrix, and said A. S. Kitteredge as such attorney was fully informed of the terms under which the same was to be delivered and to be deposited in escrow, and Sarah Woodward acting for herself and as executrix and A. S. Kitteredge fully authorized to act for the said Sarah Woodward, fully ratified in every way the agreement made by Oscar Knox and Frank P. Lewis as agents and attorneys of said
101 Sarah Woodward and Sarah Woodward as executrix; that in consideration of said deed there was paid by J. W. McConnaughey for himself and his co-owners to the said Oscar Knox and Frank P. Lewis as agent, attorney in fact and attorney at law of said Sarah Woodward and Sarah Woodward as executrix, the full sum of seven hundred dollars in cash and there was by him deposited in the said Washington national bank in pursuance to said agreement the sum of eight hundred dollars and the said J. W. McConnaughey on behalf of himself and his co-owners received the said deed from said Washington national bank and the same was afterwards duly recorded in the office of the county auditor of the ounty of King and State of Washington.

XIII.

That these defendants do not know and cannot set forth nor have they any information from which to form a belief as to whether Sarah Woodward and Sarah Woodward as executrix received the said sum of fifteen hundred dollars or any part thereof, but allege that said sum was duly paid according to the agreement between the defendants, and Oscar Knox and Frank P. Lewis as hereinbefore set forth.

XIV.

That at the time of the delivery of said deed and its execution the said premises were worth the sum of about twenty thousand dollars and no more, provided the same had been free from encumbrances and a clear and complete and perfect title could have been given thereto, but that the same were so encumbered and the title was in such a mixed and muddled condition that it was impossible to convey complete and perfect title thereto and for the purpose of sale the property was without value whatever, and these defendants had nothing whatever in any wise to do with the clouding of said title or in any wise diminishing its value in the market; that at said time the said premises produced no net revenue whatever and only produced a gross revenue in the way of rents of one hundred and forty-eight dollars per month, the buildings on said property were badly out of repair, had been condemned by the city authorities of the city of Seattle and the price paid by these defendants for said deed, all things considered, was more than could be obtained for the same from any other person whomsoever.

102 XV.

That at the time of the purchase of said property as hereinbefore set forth defendants were in possession of said property under the tax deed to H. C. Taylor hereinbefore set forth, had been advised by their attorneys that said tax title of H. C. Taylor to said premises was valid and sufficient in law and did at all times believe and still do believe the same and they purchased the semblance of a title held by said Sarah Woodward or Sarah Woodward as executrix for the sole purpose of peace and to prevent any further trouble over or cloud upon the title vested in said Taylor by said tax deed, made such purchase only after repeated solicitations from the said Oscar Knox and Frank P. Lewis attorney in fact and attorney in law as hereinbefore set forth, and that such transaction was in all things open, fair and honest and without any intent to wrong, defraud or injure any person on earth.

XVI.

That said premises were afterwards conveyed by D. F. McConnaughey defendant herein, and the title thereto remains in said

C. K. McConnaughey in order that said C. K. McConnaughey having no real interest therein, may protect, guard and properly distribute the respective undivided interests of his two brothers, D. F. McConnaughey and J. W. McConnaughey and of H. C. Taylor and not otherwise.

XVII.

These defendants allege that the real property in the complaint described was at all times since the year 1890 and still is subject to taxation according to the laws of the State of Washington; that in the year 1891 the same was duly assessed for county and State taxes; that said taxes so assessed were duly and lawfully levied upon said real property; that said taxes so assessed and levied were duly and lawfully equalized by the county board of equalization of the county of King and State of Washington, both duly and lawfully organized and acting; that said taxes were duly and lawfully listed and enrolled, and the county treasurer of the county of King duly and lawfully authorized to collect the same and that said county treasurer did proceed duly and lawfully to collect the same; that said taxes so assessed and levied on said property were
103 not paid before the first of March, A. D. 1892, but became delinquent on said day and said property was duly and lawfully sold according to law for such delinquent taxes; that at such sale for delinquent taxes said property was duly and lawfully sold to the county of King, and thereupon the said county of King duly and lawfully assigned its rights under said sale to the defendant, H. C. Taylor, for the sum of twenty-six hundred and twenty-three and 10/100 ($2623.10) dollars, being the amount then duly and lawfully due under and by reason of such a levy, assessment, delinquency and sale for taxes, and said county of King issued to said H. C. Taylor a certificate of purchase for said property as by law provided; that due and lawful notice of each and all of said doings and proceedings *were* given to and *were* had by Sarah Woodward and Sarah Woodward as executrix of the estate of Henry S. Woodward, deceased, and were recognized by said Sarah Woodward from time to time previous to the final issuance of a tax deed for said property. That no redemption of any kind was ever made by any person from such tax sale nor have such taxes ever been paid by any one except the said Taylor and said Taylor has paid all the taxes on said real property for every year since 1891, amounting to many thousands of dollars; that after said sale and about the year 1896 due and lawful notice was given to said Sarah Woodward and Sarah Woodward as executrix, and to all other persons in interest, that said H. C. Taylor would apply for a tax deed to said premises under and by reason of said sale and the expiration of said period of redemption; that at the request of Sarah Woodward and Sarah Woodward as executrix these defendants did not take out said deed as by them entitled during the summer and fall of 1896, but gave to the said Sarah Woodward at her own request repeated extensions

of time to pay to these defendants the amount which they had expended for taxes upon said property, and that finally after due notice to the said Sarah Woodward the said H. C. Taylor on the 13th day of February, A. D. 1897, received from the county treasurer of the county of King a tax deed duly and lawfully made, executed and delivered, which said deed conveyed to said H. C. Taylor the premises set forth in the complaint in this action and was duly recorded on the 17th day of February, A. D. 1897, in volume 211 of Deeds at page 626 of the
104 records of said county, and thereupon said H. C. Taylor went into immediate possession of said property and has so remained in said possession ever since. That each, every and all of the steps, acts, and deeds necessary to be done by the various officers of the State of Washington and of the county of King and by the superior court of the State of Washington in and for the county of King and by these defendants were duly, fully and lawfully taken and done so as to complete and perfect a legal tax title in the defendant H. C. Taylor by the deed of February 13th, 1897, in and to the said premises.

XVIII.

That long previous to the execution of the deed from Sarah Woodward and Sarah Woodward as executrix to D. F. McConnaughey for the premises set forth and described in the complaint in this action there was pending and remained pending at the time of the execution of said deed in the superior court of the State of Washington in and for the county of King a certain action, which is numbered as cause No. 19807 in the files and records of said court, in which action James W. Shehan and others were plaintiffs, and the said Sarah Woodward and Sarah Woodward as executrix, together with other parties were defendants, which action was for the purpose of foreclosing ten certain mechanics' liens upon the premises in the complaint in this action described; that Sarah Woodward and Sarah Woodward as executrix appeared in and made defense to said action.

XIX.

That subsequent to the making, executing and delivery of the deed from Sarah Woodward to D. F. McConnaughey, and on or about the 29th day of April, A. D. 1897, a judgment was entered in said superior court in favor of the plaintiffs in said action and against the defendants therein and thereafter an appeal was taken on behalf of said Sarah Woodward as executrix who were defendants in said cause, and said appeal was duly perfected in the supreme court of the State of Washington, and the judgment of the superior court of the State of Washington was by said supreme court in all things duly affirmed, and a due, lawful and proper remittitur thereon returned to said superior court of King county, that
105 thereafter and on or about the 9th day of April, A. D. 1898, the sheriff of the county of King and State of Washington in

pursuance of a lawful order of sale issued out of said superior court in said action, duly and lawfully sold said premises in the complaint in this action described at public sale to the highest bidder for cash to-wit, to Isabel C. Jones, and in pursuance to said sale issued to said Isabel C. Jones on or about the 9th day of April, A. D. 1898, his certain certificate of sale of said premises in accordance with law.

XX.

That thereafter and on or about the 13th day of December, 1898, the said Isabel C. Jones duly sold, assigned, transferred and conveyed for a *bona fide* consideration of five hundred dollars then and there paid to her by D. F. McConnaughey all of her right, title and interest to said property and to said certificate of sale to the said D. F. McConnaughey and in pursuance to said sale and of said assignment the sheriff of the county of King and State of Washington did on or about the 24th day of April, A. D. 1889, make,, execute and deliver to said D. F. McConnaughey a due, lawful and regular sheriff's deed to said real property.

XXI.

That thereafter on or about the 22nd day of May, A. D. 1899, the said D. F. McConnaughey made, executed and delivered to C. K. McConnaughey, defendant herein, a deed to the said premises in the complaint described conveying to said C. K. McConnaughey all the right, title and interest of said D. F. McConnaughey therein for the purpose of and thereby vesting in C. K. McConnaughey the title to and ownership of said real property in the bill of complaint described, in trust, however, for H. C. Taylor, D. F. McConnaughey and J. W. McConnaughey as their interests are hereinbefore in this answer set forth.

XXII.

That the purchase of said property by said Isabel C. Jones and the assignment from Isabel C. Jones to D. F. McConnaughey and the deed from D. F. McConnaughey to C. K. McConnaughey were made for the purpose of quieting title to said property and
106 to obtain peace and dispose of the liens established in said action hereinbefore set forth, but were in no wise made to in any wise defraud the plaintiffs or deprive said Sarah Woodward or Sarah Woodward as executrix, of any of the right whatever as her rights had been fully purchased by the defendants previous thereto, but that at said time there were still outstanding the claims, contentions, pretended leasehold interests and other defects and flaws in the title to said property, which rendered the same unsalable and which it was necessary in some manner to obliterate in order to complete a record title in and to said property, and these defendants, acting under the advice of their attorneys, took such method to assist in clearing the record title to said property and without the

thought of any right of Sarah Woodward or Sarah Woodward as executrix therein, as the said Sarah Woodward and Sarah Woodward as executrix made no claim at that time to have any right or interest therein and it was not then anticipated that such claim would ever be made.

XXIII.

That H. C. Taylor, D. F. McConnaughey and J. W. McConnaughey are the owners and in possession of the real property in the complaint described and are entitled to the possession thereof and to all the rights and benefits thereof; that the record title to said property is in the name of H. C. Taylor and C. K. McConnaughey, defendants herein, for the benefit of the true owners, and that plaintiffs have no right, title or interest therein whatsoever.

Answering said second amended complaint and as a third affirmative defense thereto and as a defense to the first cause of action in said second amended complaint set forth these defendants allege that more than three years have elapsed since the time of recording the tax deed in said first cause of action set forth before the commencement of this action.

Further answering said second amended complaint and as a fourth affirmative defense thereto and an affirmative defense to the second cause of action therein set forth, these defendants allege that the cause of action therein set forth accrued more than three
107 years before the commencement of this action.

And further allege that the facts therein set forth were well known to the plaintiffs in this action more than three years prior to the commencement thereof.

For a fifth affirmative answer to said second amended complaint and to the third cause of action and to the fourth cause of action therein set forth joining the same in this affirmative defense for the purpose of avoiding unnecessary repetition, these defendants allege that the causes of action set forth in said third cause of action and in said fourth cause of action accrued more than two years prior to the commencement of this action.

Wherefore having fully answered the complaint of the plaintiffs herein these defendants pray that this action be dismissed and that they recover of the plaintiffs their costs and disbursements herein.

R. S. JONES,

Attorney for Defendants, H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey.

THE STATE OF WASHINGTON, }
County of King, } ss:

J. W. McConnaughey being first duly sworn, on oath says; that he is one of the defendants who have made the foregoing answer to the second amended complaint of the plaintiffs herein, has read the same, knows the contents thereof and the same are true.

J. W. McCONNAUGHEY.

Sworn to and subscribed before me on this the 26th day of Dec. 1901.

R. S. JONES,
Notary Public in and for the State of Washington,
Residing at Seattle, in said State.

108 EXHIBIT B TO ANSWER.

This agreement, made and entered into this 22nd day of April 1897, by and between D. F. McConnaughey, party of the first part, Sarah Woodward personally and as executrix of the estate of Henry S. Woodward, deceased, party of the second part, and the Washington National Bank of Seattle, Washington, party of the third part,

Witnesseth: That the party of the second part has deposited with the party of the third part a deed of lot eight (8) in block eleven (11) as shown on David S. Maynard's plat of the town (now city) of Seattle, and also the abstract of title to said property, to be held by said party of the third part until the 15th day of May, 1897. If on said 15th day of May or at any time prior thereto the party of the first part shall deposit with the party of the third part, the sum of eight hundred dollars ($800) which said party of the first part agrees to deposit, that then said party of the third part shall deliver to said party of the first part or his agent, J. W. McConnaughey, said deed and abstract of title.

Said eight hundred dollars ($800) to be disposed of as follows: So much thereof as shall be determined between the parties of the first and second part- to be sufficient to satisfy one half of the judgment obtained in a certain foreclosure of lien in favor of A. S. Kerry is to be held by said party of the third part subject to a further escrow agreement to be hereafter made and the balance of said $800 to be turned over to the said party of the second part.

D. F. McCONNAUGHEY,
By J. W. McCONNAUGHEY, Agent.
SARAH WOODWARD,
By O. KNOX, Att'y in Fact.

This escrow *and* agreement is continued in full force as to $366.50 for one week or to Saturday, May 22, 1897, at 12 noon, the balance of the eight hundred dollars having been paid.

Dated May 15, 1897.

D. F. McCONNAUGHEY,
By J. W. McCONNAUGHEY.
SARAH WOODWARD,
By O. KNOX, Att'y in Fact.

Filed Dec. 28, 1901.

C. A. KOEPFLI, Clerk,
By C. E. PLIMPTON, Deputy.

109 In the Superior Court of the State of Washington for King County.

SARAH WOODWARD and JOHN H. McGRAW, as Administrators with the Will Annexed of the Estate of Henry S. Woodward, Deceased, Plaintiffs,
vs.
H. C. TAYLOR and LIDA R. TAYLOR, His Wife; J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants.
} Reply.

Come now the plaintiffs — for reply to the new matter in the answer of the defendants H. C. Taylor, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, state as follows, to-wit:

For reply to the allegations set forth in the first affirmative defense of said answer, plaintiffs show as follows, to-wit:

I.

They admit the allegations of paragraph I of said affirmative defense.

II.

They deny each and every allegation of paragraph II of said affirmative defense.

III.

They admit that the action referred to in paragraph I of said affirmative defense was dismissed by said court, at plaintiffs' costs, but deny that the order dismissing said action was the final order therein, and they deny that said action was for and related only to the first cause of action mentioned in the second amended complaint herein; they deny that a writ of error was sued out from such decision to the United States circuit court of appeals, for the ninth judicial circuit, and allege that an appeal was taken from such decision to said court; they deny that all or any of the proceedings in said action, as are material to a determination of the issues in this action, are set forth in the transcript attached to said answer and marked "Exhibit A to Answer."

110 IV.

They admit that the appeal referred to in the last preceding paragraph hereof, came on regularly for hearing and argument, and was determined by said court of appeals, and that a decree was entered therein, which became and was the final decree in said cause as set forth in paragraph IV of said affirmative defense, and they deny each and every other allegation in said paragraph contained.

V.

They admit the allegations of paragraph V of said affirmative defense.

VI.

They deny the allegations of paragraph VI of said affirmative defense.

And for reply to the allegations of the second affirmative defense set forth in said answer, plaintiffs states as follows:

I.

They deny each and every allegation of paragraph I of said second affirmative defense.

II.

They deny each and every allegation of paragraph II of said second affirmative defense.

III.

They deny each and every allegation of paragraph III of said second affirmative defense.

IV.

They deny each and every allegation of paragraph IV of said second affirmative defense.

V.

They admit that all the acts of the defendant H. C. Taylor touching or relating to any of the matters complained of in the complaint were done by said Taylor, in the interest of all the defendants herein; and they deny each and every other allegation in paragraph V of said affirmative defense contained.

VI.

They admit that prior to the 13th day of February, 1897,
111 there were certain claims of mechanics' and laborers' liens, on file in the office of the auditor of King county, but they have no knowledge or information sufficient to form a belief as to the particular liens or claims referred to by the defendants in paragraph VI of the said affirmative defense and therefore deny the same; and they deny that there were any liens upon said premises amounting to the total sum of about fifteen thousand dollars, but allege that the total sum of valid liens and claims against said premises was five hundred and thirty nine dollars and no more; and they allege that the amount thereof was adjudicated to be in the sum

herein by plaintiffs stated, and that such adjudication was had and made in that certain action particularly referred to by defendants in said paragraph VI; and plaintiffs deny each and every other allegation in said paragraph contained.

VII.

They admit that the said H. C. Taylor, on the 18th day of February, 1897, and ever since has claimed to be the owner of said premises holding the legal title thereto for the benefit of the other defendants and claiming to hold the same in trust for said defendants and himself; but they allege that whatever title or interest said Taylor and the other defendants had in or to said premises, was and is in reality in trust for these plaintiffs; and they deny each and every other allegation in paragraph VII of said defense contained.

VIII.

They deny each and every allegation contained in paragraph VIII of said affirmative defense.

IX.

They deny each and every allegation contained in paragraph IX of said affirmative defense.

X.

They admit that for a long time previous and subsequent to the month of February, 1897, one A. S. Kittredge, an attorney at law of good repute and standing at the bar in the State of California and residing at said city of San Jose, was their general attorney and counsel, as set forth in paragraph X of said second affirma-
112 tive defense, and they deny each and every other allegation in said paragraph contained.

XI.

They deny each and every allegation contained in paragraph XI of said second affirmative defense.

XII.

They deny each and every allegation contained in paragraph XII of said second affirmative defense.

XIII.

They deny each and every allegation contained in paragraph XIII of said second affirmative defense.

XIV.

They deny each and every allegation contained in paragraph XIV of said second affirmative defense.

XV.

They deny each and every allegation contained in paragraph XV of said second affirmative defense.

XVI.

Upon information and belief they admit that the defendant C. K. McConnaughey claims to hold the nominal title to said premises, for the benefit of the other defendants in this action as set forth in paragraph XVI of said second affirmative defense, but they allege that in reality he holds said title in trust for these plaintiffs.

XVII.

They deny each and every allegation contained in paragraph XVII of said second affirmative defense.

XVIII.

They admit each and every allegation of paragraph XVIII of said second affirmative defense, except that they deny that the liens or claims of liens sought to be foreclosed in the paragraph referred to were valid.

XIX.

They admit the allegations in paragraphs XIX of said second affirmative defense, except that they allege that the said Isabel C. Jones was not a purchaser of said premises in her own behalf,
113 but that in all matters connected therewith she acted on behalf of the defendants herein.

XX.

They admit all the allegations of paragraph XX of said second affirmative defense, except that they deny that the said Isabel C. Jones conveyed her interest in said premises for a *bona fide* consideration of five hundred dollars ($500.00) or any other sum, then and there paid to her by the defendant D. F. McConnaughey, and they allege that the said Jones simply conveyed at said time her nominal title to said premises, without any consideration whatsoever.

XXI.

They have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXI of said affirmative defense, except that they are informed and believe that the said defendant C. K. McConnaughey claims to hold the title to said premises in trust for the defendants herein, but they allege that in reality he holds said title in trust for these plaintiffs.

XXII.

They deny each and every allegation contained in paragraph XXII of said second affirmative defense.

XXIII.

They deny each and every allegation contained in paragraph XXIII of said second affirmative defense, except that they allege that the right, title or interest claimed or held by said defendants H. C. Taylor and C. K. McConnaughey is held by them for the benefit of the true owners of said premises, to-wit, these plaintiffs, and not otherwise.

And for reply to the third affirmative defense set forth in said answer, they deny each and every allegation contained in said defense.

And for reply to the fourth affirmative defense set forth in said answer, they deny each and every allegation contained in said defense.

And for reply to the fifth affirmative defense set forth in said answer they deny each and every allegation contained in said defense.

114 And for an affirmative defense to the allegations set forth in the first affirmative defense set forth in said answer, these plaintiffs allege as follows, to-wit:

I.

That on or about the 25th of May, 1900, the plaintiff Sarah Woodward and Sarah Woodward as executrix of the last will and testament of Henry S. Woodward, deceased, instituted an action in the circuit court of the United States for the ninth circuit, district of Washington northern division, against certain of the defendants herein, to-wit C. K. McConnaughey, J. W. McConnaughey, H. C. Taylor and D. F. McConnaughey; which said action was the same action, as the action referred to in paragraph I of the first affirmative defense set forth in said answer and the exhibit attached thereto.

II.

That there were no other parties plaintiff or parties defendant to the action referred to in the last preceding paragraph, and the parties defendant in this action were different from the parties defendant in said action, as follows, to-wit: Lida R. Taylor and Isabel C. Jones.

III.

That the action referred to in the first paragraph hereof was different and for a different cause from any of the causes of action set

forth in the second amended complaint herein, in many respects, and particularly in this, that is to say:

1. The said action was one single and sole cause of action, so stated and determined by said court, and that said cause of action was not divided nor divisible.

2. Previous to the beginning of said action, no tender had been made to the defendant therein, or either of them, of the moneys or any moneys claimed to have been paid by them, on account of certain taxes alleged to have been assessed against said premises, nor on account of the taxes lawfully due upon said premises, or on account of certain other payments alleged to have been made by said defendant on account of certain liens, claims and conveyances, upon, of and to said premises.

115 3. The amended complaint in said action stated that one Isabel C. Jones was the owner and holder of the legal title to said premises under and by virtue of an execution sale in a proceeding in the above entitled court wherein one A. S. Kerry was plaintiff, and judgment creditor; which said legal title, the said Isabel C. Jones was therein alleged to hold as trustee for and on behalf of the defendants therein; and said complaint failed to show that the said Isabel C. Jones had at said time conveyed, assigned and transferred her said legal title to the defendants.

IV.

That during the pendency of the action referred to in the first paragraph hereof, the defendants in said action joined issue with the allegations set forth in the amended complaint therein, by demurrer thereto; which said demurrer was in terms as set forth on pages 45 to 47 inclusive, in Defendant's Exhibit "A" to the answers herein; and thereafter, on or about the 26th day of July, 1900, the said demurrer having been sustained, upon the first and fifth grounds thereof, the said action was dismissed at the costs of said plaintiffs; that thereafter the said plaintiffs appealed from the said dismissal, to the circuit court of appeals for the ninth district of the United States and thereafter, on the 11th day of February, 1901, the said circuit court of appeals rendered a decision upon the issues of said appeal, wherein and whereby it was solely adjudicated and determined that the said action should be dismissed upon the first ground of said demurrer, only, to-wit, "That there is a defect of parties defendant, in this to-wit, that under the facts set forth in said amended bill of complaint Isabel C. Jones is a necessary party defendant," which said decision was in writing and was filed among the papers and proceedings and records in said cause, and was in words and figures, as follows, to-wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

SARAH WOODWARD and SARAH WOODWARD as Executrix of the Last Will and Testament of Henry S. Woodward, Deceased, Appellants,

vs.

C. K. MCCONNAUGHEY, J. W. MCCONNAUGHEY, H. C. TAYLOR, and D. F. McConnaughey, Appellees.

116 T. O. Abbott, for the appellants.

William H. Brinker and Richard Saxe Jones, for the appellees.

Before Gilbert, Ross, and Morrow, Circuit Judges.

GILBERT, Circuit Judge, delivered the opinion of the court.

The appellants were the complainants in a bill brought to set aside a tax title to their property acquired by J. W. McConnaughey one of the appellees, and to rescind and set aside a quit claim deed of said property made to the said McConnaughey by the appellants, on the ground that it was made under mistake and induced by fraud. The defendants demurred to the bill upon several grounds, one of which was that it appeared from the allegations of the bill that one Isabel C. Jones was a necessary party to the suit but was not made a party thereto. The demurrer was sustained and at the same time the complainants were given leave to amend the bill within thirty days thereafter. They failed to amend within the time specified and thereupon a decree was entered dismissing the bill. From that decree the present appeal is taken.

A motion is made to dismiss the appeal upon the ground that the appellants had waived their right to appeal from the final decree by requesting leave to amend or to plead further after the court had sustained the demurrer to their bill. In support of the motion the appellees cite McElwain v. Willis, 9 Wendell, 598, State of New York v. Kent, 4 N. Y. S., 802, Austin v. Wauful, 13 N. Y. S., 184, Pacific Supply Co. v. Brand, 7 Wash. 357, and Hall v. Skavdale, 21 Wash. 203. We think the motion should be denied. The appellants are not in the attitude of availing themselves of the decree of the circuit court and at the same time appealing from it. The evidence of a waiver of the right to appeal must be clear and decisive. 2nd Ency. Pl. & Pr. 173 and cases there cited. All that the appellees can claim from the record in support of their notion to dismiss is that at the time when the court ruled upon the demurrer the appellants obtained an order permitting them to amend their bill within a specified time, and that at the end of that time instead of availing

117 themselves of the permission they elected to stand upon the bill as it was, and that thereupon the bill was dismissed. It was not dismissed for want of prosecution or for default of the ap-

pellants as was the case in the Washington decisions cited by the appellees. The effect of the dismissal is substantially the same that it would be if there had been no permission to amend and the decree had been entered immediately upon the order sustaining the demurrer.

Concerning the interest of Isabel C. Jones in the subject of the controversy the bill alleges that prior to February 24, 1895, certain mechanics' liens amounting to $8384 were filed against the property in litigation and that on that date suit was brought to foreclose the same, that a decree foreclosing said liens was rendered and that the decree and all rights thereunder were purchased by and assigned to Isabel C. Jones and that thereafter in pursuance of said decree the property was sold and conveyed to the said Isabel C. Jones. The appellants contend that Isabel C. Jones is shown to be an unnecessary party to the suit and by other averments of the bill which allege that the money to purchase said decree was furnished her by J. W. McConnaughey and that she was a nominal purchaser only, and was in reality acting as trustee for McConnaughey, and that the transaction was carried on in her name solely for the purpose of concealing the facts, and that McConnaughey is a trustee for the appellants under said decree, execution and sale. These allegations do not change the aspect of the case so far as it concerns the necessity of making Isabel C. Jones a party. The complainants can not aver that the title to the property which is the subject of the suit is vested in one who is not a party to the suit, and dispense with the necessity of bringing him before the court by averring that his interest is that of a trustee for one of the defendants. The trustee is nevertheless a necessary party. So far as the allegations of the bill are concerned the decree foreclosing the liens was a valid decree and the title acquired thereunder is the title to the whole of the real estate which is in *the* controversy in the suit. If it be not true as alleged in the bill that the title vested in Isabel C. Jones is held in trust for the appellants, it follows that the court is called upon to
118 deal with property in which neither the appellants nor the appellees have any interest. The court can afford the relief which is prayed for only by finding that Isabel C. Jones holds the title in trust for McConnaughey. This it cannot do unless she is brought into the suit. Equity rule 47 it is true, permits a relaxation of the chancery rule as to parties in case where a necessary party is without the jurisdiction of the court or where his joinder would ouset the jurisdiction. The supreme court has nevertheless repeatedly held that the rule does not enable the circuit court to make a decree which can affect the rights of one who is absent and that all persons whose interest would be directly affected by the decree are indispensable parties. Shields v. Barrow, 17 How. 130, 139. Ribbon v. Railroad Co., 16 Wall. 446, 450. Williams v. Bankhead, 19 Wall. 563. Kendig v. Dean, 97 U. S. 423. But in the present suit no case is made for the application of rule 47. No reason is alleged for omitting Isabel C. Jones from the parties defendant.

The court is called upon to go no farther than to apply the general chancery rule that all those who have an interest in the subject of the controversy or whose presence is necessary to a determination of the entire controversy must be made parties. O'Hara *et al.* v. McConnell *et al.*, 93 U. S. 150. Kendig v. Dean, 97 U. S. 423. Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., 27 C. C. A. 73. Tested by that rule there can be no doubt that the demurrer for want of a proper party defendant was properly sustained by the court. It is unnecessary to consider the other grounds of demurrer. The decree will be affirmed.

All of which said matters and things appear of record in the files, proceedings and briefs on file and of record in the office of the clerk of said circuit court of the United States and of said court of appeals.

V.

That the said decision by the said circuit court of appeals was the final decision and judgment in said cause, and that no other final decision or judgment was ever rendered by said court in said cause, nor by any other court of competent jurisdiction, relative to
119 any of the matters in issue in said action.

VI.

That no action or proceeding was ever had between these plaintiffs or their privies, and the defendants herein, or their privies, relative to any cause of action whatsoever, except as in this affirmative defense set forth.

Wherefore plaintiffs pray that the defendants take nothing by their answer.

T. O. ABBOTT,
Attorney for Plaintiffs, Room 605,
New York Block, Seattle, Wash.

STATE OF WASHINGTON, } ss:
County of King, }

I, T. O. Abbott, being first duly sworn, do on oath depose and say: that I am the attorney for the plaintiffs in the above entitled action; That I have read the foregoing reply know the contents thereof, and believe the same to be true; that the reason that I make this affidavit is, that the principal plaintiff is absent from and a non-resident of the county of King, State of Washington.

T. O. ABBOTT.

Subscribed and sworn to before me this 25th day of February, 1902.

N. S. PETERSON,
Notary Public, Residing at Seattle,
King County, Washington.

Filed Feb. 26, 1902.
C. A. KOEPFLI, Clerk.

120 In the Superior Court of the State of Washington for King County.

SARAH WOODWARD ET AL., Plaintiffs,
vs.
H. C. TAYLOR ET AL., Defendants.
No. 31864. Order.

This cause having come on for trial in accordance with the order of this court assigning the same, and all the parties being present in court by their respective attorneys, the plaintiffs being represented by their attorneys T. O. Abbott and Preston, Carr & Gilman, and the defendants by their attorneys, Richard Saxe Jones and William H. Brinker; and the trial having proceeded by the introduction of evidence in support of the first cause of action set forth in plaintiffs' second amended complaint, the plaintiffs proceeding thereupon to offer further evidence in support of the second, third and fourth causes of action set forth in said second amended complaint, and objection having been made by the defendants to the introduction of any further evidence, and said objection having been by the court sustained; and the plaintiffs having, thereupon, made an offer to introduce further evidence in support of said second, third and fourth causes of action in said second amended complaint, and the court having denied and refused the said plaintiffs the opportunity to introduce such further evidence; and the defendants having, thereupon, requested the court, of its own motion, to dismiss this action and the court having duly considered said motion and it being stated by the attorneys for the plaintiffs that if the defendants have a good and sufficient title to premises described in second amended complaint, under the evidence submitted in support of the first cause of action of said complaint, it would be useless to try the other causes of action set forth in the second amended complaint and the court being of the opinion that the tax title of said defendants to said premises is valid and sufficient and binding as appears by the evidence submitted.

It is hereby ordered, adjudged and decreed that this action be and hereby is dismissed at plaintiffs' costs; to which order and each and every part thereof, the plaintiffs, by their attorneys duly excepted and such exception was allowed.

121 And now, in open court, the plaintiffs, by their attorneys, give notice of an appeal, from said order of dismissal, to the supreme court of the State of Washington.

Dated June 3, 1902.

ARTHUR E. GRIFFIN, Judge.

Filed June 4, 1902.

C. A. KOEPFLI, Clerk.

122 Bill of Exceptions or Statement of Facts.

SARAH WOODWARD ET AL.
vs.
H. C. TAYLOR ET AL. } No. 31864.

123 Index.

Testimony and Proceedings.

SARAH WOODWARD ET AL.
vs.
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124 In the Superior Court of the State of Washington in and for King County.

SARAH WOODWARD, JOHN H. McGRAW, Administrator, *et al.*, Plaintiffs,
vs.
H. C. TAYLOR ET AL., Defendants. } No. 31864.

This cause coming on regularly for hearing on this 2d day of June A. D. 1902, before the Honorable Arthur E. Griffin, judge, the plaintiffs appearing by T. O. Abbott, Esq. and L. C. Gilman, Esq., and the defendants appearing by Messrs. Brinker and Jones, the following proceedings are had and testimony taken:

125 Mr. ABBOTT: We desire to make a formal amend
the complaint to conform to the proof in the case.
to the making of the former application to amend we serv
tice on the attorneys for the defendants of our purpose to
deposition of C. T. Johns residing at Oakland, California, for
pose of establishing the facts that we desire. We submitted
interrogatories and notified the parties that at the time of t
ing we would ask this court to settle the interrogatories.
time we served the proposed interrogatories upon the partie
form and the proof of it is here. At the time when the app
was to be heard the parties did not appear at all and no o
was made to the interrogatories in any manner whatever,
commission went away and the deposition has been taken
been returned. Now our contention is, that the parties havin
to make appearance at the time when we notified them w
make the application for the commission, and having faile
ject to the competency and relevancy or materiality of the q
which we submitted, they waived any right or claim that the
have had or might have pretended to have as to surprise in
tion with the matter and as to the application being made
We have been put to the expense of taking the deposition
commission and the deposition is here ready to be introduce

Mr. JONES: The court will remember this is an attempt t
duce a new cause of action into the complaint after all t
mony on depositions have been taken. They served notice
the deposition of C. T. Johns, and the day was set and the int
tories were settled and the depositions were sent away
126 he moved to amend his complaint under which he e
to introduce this testimony. These interrogatories we
lutely incompetent, irrelevant and immaterial to any issue
cause at the time and, therefore, we did not care how many
tions as to that matter he should take, but he sends off and g
ositions upon a question not at issue at all and not even hi
and upon a question upon which we have five repeated adm
from him in the cause, and now he wants the court to come
amend his complaint to introduce a new cause of action abs
different from any cause of action that he had in the complai
which is absolutely contrary to the five complaints and an
complaints which have been filed since this case began in the
States court. We would be helpless to meet the question if t
allowed. The question he wishes to introduce is, whether
Woodward made a deed to McConnaughy. She testifies in h
deposition she made the deed to D. F. McConnaughy in the fir
plaint in the United States court she swore she made the d
McConnaughy, and the amended complaint served by Mr. M
naughy. When we went down to take her deposition in May
San Francisco she would not make her deposition, claiming s
sick. We cannot meet the issue and they are too late after
ting the making of this deed, to come in here at the very las

nte and attempt to deny it and then put in a cause of action that Sarah Woodward signed it when there was a blank in the deed after she positively swore in her deposition that she made the deed and made it to McConnaughy. This deposition comes too late and it is
127 irrelevant, immaterial and incompetent to introduce this deposition of Johns if they could introduce it a dozen times or take depositions all over the United States they would be irrelevant, immaterial and incompetent. This is an equity case and I am not afraid of the mind of the chancellor being biased, but this amendment comes too late.

Mr. ABBOTT: The counsel avoids entirely the matter that he did not make any objection to these questions. If the witness were on the stand I think the court would have received this evidence under the complaint as it stood. We had no opportunity to ascertain the facts that we are seeking to insert in the complaint previous to the time that we made the application, and the fact that it was incorporated in the complaint that we made the deed to McConnaughy, because that is the way that it appears in the record, ought not to prevent us from introducing this testimony. Sarah Woodward, the plaintiff, is eighty years of age and she is not supposed to know the importance of this thing and I had no acquaintance with her and there was no way that we could ascertain the facts earlier than we did.

The COURT: I will deny the motion.

Exception noted for plaintiffs.

Mr. JONES: Have you any other motions to amend?

Mr. ABBOTT: No.

Mr. JONES: We would like to make a couple of immaterial amendments so that the answer may speak the truth and not be misinterpreted. We have said in our denials that the defendants believe that they had a good and sufficient tax deed to this property.
128 There might be some misinterpretation of the language and we would like it to read that they believed that they had a good and sufficient title so far as a tax deed could give it to them. I do not want it to appear that the defendants claimed that they had a title in fee simple, because up to the time of her deed they do not so claim. I want it to read, that they had a good and sufficient title so far as the tax deed could give it to them and I would like to interline it.

Mr. GILMAN: It seems to me there is a serious objection to that. A good and sufficient tax deed gives good and sufficient title. Now they are attempting to change their position from one in which they relied upon their title to one in which they did not rely upon their title; in other words they desire an opportunity to say "We do not believe that we had good title although we do believe that we had as good a title as this particular tax deed could give to us." I submit at this time the amendment should not be allowed.

The COURT: Motion denied, exception noted for defendants.

Mr. JONES: On page 22 of the answer is the third affirmative

defense where it says "These defendants allege that the cause of action set forth accrued over two years before the commencement of this action." Now that was fully denied and a demurrer overruled to it and then in the reply it is absolutely denied. We would like to change that to the three year clause; Mr. Abbott's position on the demurrer being that the ten year clause, or at best, the five year clause, is the statute of limitations against a tax title. We have pleaded the two years and I would like to change it to read three years.

129 Mr. GILMAN: It seems to me under the rulings already made the pleadings had better stand as they are. The court will see that this raises purely an issue of law which has already been tried out and the parties are here prepared to go to trial upon this issue and it is raising an entirely new issue of law which we are not prepared at this time to meet; I do not see why the positions should be again changed in the matter. A demurrer was filed and overruled and the issues closed on that and it seems to me they should not be re-opened again.

Mr. JONES: The wording should be "That the action set forth in said cause of action accrued more than three years before the recording of the tax deed—that more than three years have elapsed before the commencement of this action since the recording of the tax deed," that is the way the wording should be.

Mr. ABBOTT: We presented this matter on demurrers and motions to strike and we are prepared to show now that the answer as set up as an affirmative defense is not sufficient to constitute a cause of action or a defense against our cause of action, and I think that the parties ought not to be permitted to come in here and inject facts into their answer at this late hour for the purpose of setting up a defense like the statute of limitation.

The COURT: Permission is granted to amend this paragraph by changing the word "two" to "three."

Mr. JONES: I only desired the wording should read the other way, because the decision seemed to be that the wording of such a defense as that should be "These defendants allege that more than three years have elapsed since the time of recording the tax

130 deed in said paragraph set forth." Of course it might be that the court would allow us to show exactly the same position we could show by changing the wording as I suggest, but the other language follows the statute and for that reason I would like the amendment to make the clause read as I have read it.

Mr. GILMAN: If the court please, counsel took his own form before he made his pleading; a motion was filed to it, a demurrer also, and both of which he contested and both of which were sustained. If he has not a sufficient pleading now it seems to me that we should have the advantage of it and not be compelled to reshape our issues.

The COURT: I suggest that if neither of you gentlemen are ready for trial the best thing would be to continue the case.

Mr. ABBOTT: We are ready for trial on the issues as made up and counsel is seeking to bring in new issues and we have had no notice of any attempt to amend.

Mr. JONES: Under their own first cause of action they are obliged to introduce this tax deed. They themselves have set it up and allege that it existed and also when it was recorded and we have set up as a plea against that deed the statute of limitation; it is true we have worded one word wrong and we have not followed the statute, but that is a mistake any one could make and we do not ask to change a single issue and shall rest on the effect of that deed. We have already pleaded the statute of limitations, but we have not worded our plea in exactly the language of the statute and I ask
that the amendment be made so that our plea may follow the
131 language of the statute as to an immaterial matter, except to
make a clean record, and our statute on amendments provide that we can make that amendment under our statute. They come in here knowing that they had to meet the issue of the statute of limitations and we should be allowed to make this amendment simply to conform our pleading to the rule laid down by the statute of the State of Washington.

The COURT: I will permit this amendment by interlineation.

(Exception noted for plaintiffs.)

Mr. JONES: Now may it please the court at this time, not desiring unless the court so desires, to go into any extended argument of this question, but in order to save the question for future argument, we desire to move the court to amend any errors which are alleged in the complaint in this action to exist either in the assessments, listing, levy or any of the proceedings prior to judgment under which this tax deed was issued; any errors in judgment, in the return process upon which the judgment was issued; any errors that may exist in the notice under which the tax deed issued, any errors which may exist in the certificate of purchase, or any errors which may exist in the deed itself.

We make this motion now and ask leave of court to ask for these amendments as the trial progresses as any such amendments may appear to be necessary, taking them up one by one, which will bring them more clearly before the court when the time arrives. We ask this under the statute of 1889 under which the assessment was made, and next under the statute of 1893 under which the sale
was made and the judgment rendered and the tax deed issued,
132 both of which statutes expressly provide that the court may
at any time amend any one of these irregularities of the officers in executing tax deeds. We are prepared to make an argument of this question at length now, but it would be better for the interests of all if the court at this time would reserve its ruling and leave it open until the first error of this kind arises, saving the record for us that we have made the motion in time.

Mr. ABBOTT: I think if the counsel desires to press that motion we may as well have it argued at this time as any other time. This

is an attempt to make a title which is confessedly bad, a good title by correcting the proceedings under which the title was secured. I think it does not require any further statements to show that such a request at this time cannot be granted, but if the court desires to hear authorities on that we will present them.

Mr. JONES: We do not desire to waive our rights by having the other side say that we have not asked leave to make those amendments, but we ask leave to state to the court that we intend to ask to make such amendments and we do not waive our rights to ask for them. This is in the nature of a notice to counsel that we ask leave to make these amendments, and we ask leave to make them as we come to them and not argue them in a bunch. The court can readily see that one argument will not be applicable to all cases, for instance, there is a question of a *nunc pro tunc* entry to make; there is also a question of leave to amend under the statute by which amendments can be made in the assessment, in the levy or listing for any clerical errors of officers—different questions arise
133 that we can argue if the court is willing that these questions should be raised when we come to them we can argue them according to their bearing and get the ruling of the court and not have to argue two or three or four or five or six questions in one lump. Our object is to expedite the trial of this case and bring it more clearly before the court as the questions are raised. We do not want to be foreclosed by counsel beginning his argument at this time.

Mr. ABBOTT: I think it would be wise to get into the trial of this case and proceed. Counsel is now seeking to preclude us from presenting our case by giving us notice that he is going to raise objections which have been already determined by the court. If the court has any doubt about the right of granting the request of counsel I desire to be heard.

The COURT: You may proceed with the trial of the case.

(Here counsel for plaintiffs makes statement of the case to the court.)

Mr ABBOTT: I will ask Mr. McConnaughy to take the stand and produce certain records.

Mr. JONES: If counsel have certified copies of any records we will not object to them because they are certified copies.

Mr. GILMAN: Is it not better to read certain portions of them into the stenographer's minutes?

134 J. W. MCCONNAUGHY, produced as a witness in behalf of plaintiffs, being first duly sworn, testifies as follows:

(Mr. ABBOTT:)

Q. Mr. McConnaughy, you are one of the defendants in this case?

Mr. JONES: We object at this time to the introduction of any evidence under the first cause of action set forth in the complaint for

reasons that appear upon the face of the complaint itself, and further object to the introduction of any evidence under any cause of action stated in the complaint, for the reason that it does not state facts sufficient to constitute a cause of action. In the first cause of action the court will remember that the statute requires that before such an action can be brought and before any complaint can be filed there must be tendered to the party owning the tax title all the monies which he has paid for taxes with penalty and interest. They allege in their complaint that they have not done that. They say in their complaint that they have tendered to H. C. Taylor, the owner of the tax title all except the taxes for November, 1900. They allege that they went to make a tender to the county treasurer of the taxes of 1900, there is no provision in the statute for that. They say they delivered some money to the county treasurer and he gave them a preliminary receipt and later returned the money to them, and that is a notice to them that these taxes were paid by somebody else, and they never afterward made the tender to the party who paid the taxes. The supreme court in the case of Merritt against
Corey has expressly held that the original owners of the prop-
135 erty cannot attack a tax title of this kind until he has made a full and complete tender of all the money, together with penalty and interest which the tax title owner has paid. Now in this complaint they allege that they have not done that, and under the decision of the supreme court they are not entitled to proceed a step further; and the second reason is that they have not kept their tender good as the statute intends that the tax title owner shall have the right at all times either to make a defense or to take his money; and for that reason they cannot be allowed to introduce any evidence under the first cause of action. The court will remember that the statute provides, under which this tax deed was issued and sale was had, provides for judgment and provides that that judgment shall be conclusive as to all the precedent facts; the assessment, levy and enlisting of the property, and the enrollment and delivery of books to the county treasurer and all such precedent steps with the judgment, and that in that way any evidence of anything preceding the judgment would be immaterial, and our objection also goes to this point on that ground.

(Objection overruled, exception noted for defendant.)

(Question repeated to the witness.)

A. Yes sir.

(Mr. ABBOTT:)

Q. What, if any, official position do you hold in the county of King?

A. County treasurer.

Q. As such county treasurer do you have in your possession volume 11 of the tax rolls for the year '91?

136 A. They are supposed to be I presume.

Q. Have you them with you now?

A. No, sir, I do not care to carry them around.
Q. You were served with a subpœna to bring them, were you not?
A. No sir, it may have been served in the office. I was not there on Saturday.

Mr. ABBOTT: We ask that the witness produce the records which we now desire to have introduced.
Mr. JONES: We object, for the reason that there is no showing that process was issued or subpœna served on the witness and we object to his lugging them up here.
Mr. ABBOTT: Process was issued on Saturday and placed in the hands of the sheriff to serve and I supposed he had done his duty, and besides that Mr. McConnaughy stated that he would bring the papers here.
Mr. GILMAN: These records belong to the public and if they are material to the parties they should be produced here.
Mr. JONES: We have no objections to anything that ought to be brought up here being brought up here.
The COURT: Will you bring the assessment rolls for that year?

(By the WITNESS:)

A. I can send for them.

Mr. ABBOTT: We call for volumes 11 and 15 of the rolls of 1891 and also for the original rolls entitled "Tax Judgment Roll and Forfeiture Record" for the year 1891, and certain other original documents.
The COURT: Very well, proceed.
Mr. ABBOTT: I cannot proceed until I have these books.
The COURT: You can make an arrangement Mr. McCon-
137 naughy, to have the books brought up here.
Mr. ABBOTT: While these records are being brought up I will ask the witness a question:

Q. Mr. McConnaughy who is your deputy and who was your deputy treasurer on March 1st, 1891.
A. Mr. Levy.
Q. Would you recognize his signature if you saw it?
A. I would.
Q. I will ask you to look at that paper and say whether that is his signature (showing).
A. It looks like it as near as I can judge.
(Document marked "Plaintiffs' Identification A.")
Mr. ABBOTT: I offer in evidence Plaintiffs' Identification "A."
Mr. JONES: We make the same objection to this that was previously made to all the testimony offered and the further objection as irrelevant, immaterial, incompetent and there is nothing about this paper in any wise that connects it with anything in this cause of action or identifies anything connected with this cause of action.

The COURT: Do you expect to connect this with the subject matter?

Mr. ABBOTT: I do, yes sir.

Mr. JONES: Then we object to the introduction of it at this time until it has been properly identified and connected with the cause of action.

(Objection overruled, document marked "Plaintiffs' Exhibit A.")

Mr. ABBOTT: For the purpose of expediting the matter I will submit another document.

138 Q. Mr. McConnaughy, have you ever seen that paper before (showing witness paper marked "Identification B".)

A. I guess so, that is my signature.

Mr. ABBOTT: I offer in evidence "Plaintiffs' Identification B."

Mr. JONES: I would like to ask the witness for information a few questions before objecting to this.

(Mr. JONES:)

Q. I find here in these files of papers, Mr. McConnaughy, a notice and proof of service of the notice for an application for a tax deed on L. Gemechi, who was he?

A. He was a tenant.

Q. A tenant of this property?

A. Yes sir.

Q. And H. Aferdam, who was he?

A. He was a tenant?

Q. And Oscar Knox, who was he?

A. He was supposed to be representing the owner of the property as I understood—I got that from the tenants.

Q. And Sarah Woodward, the plaintiff?

A. Yes.

Q. A. Lombardini, who was he?

A. A tenant.

Q. And Benjamin Greenberg, who was he?

A. He was a tenant.

Q. Were those all the tenants of the property at that time?

A. Yes sir, that is they were all of the separate tenants, yes. Lombardini had a lease on the upper floors and had control of that part of it.

Q. These tenants were tenants of Sarah Woodward, the
139 plaintiff in this action.

A. Yes.

Mr. GILMAN: I object to that as irrelevant and immaterial, the record itself shows what it is and it is not for the witness to say what it is.

Mr. JONES: We have no objection to it as a certified copy, but at this time we object to it for the reason that the statute provides that if there are any errors in the acts of any officer or any irregularity

in the obtaining of this tax title that it may be cured by amendment, and this court has authority to so amend at this time and we ask leave to make such amendments if there are any errors existing in these papers; second, we ask leave, should any such error exist which in any wise goes to the formalities necessary to be gone through before the issuance of a tax deed, to make further proof, if if such should be found to be necessary in support of this deed and in the service of these notices. Next we object on the ground that this is an attempt to attack this tax deed by reason of mere technical irregularities in the form of notice contained herein, in the form of the certificate of purchase contained herein, in the form of the affidavit showing the service of notice, and we take the position that these affidavits are like returns of the sheriff, and any attempt to attack the tax deed upon such immaterial matters would not be sufficient showing, or any evidence in this cause, and if it was it could be cured by oral evidence.

(Objection overruled, document received in evidence and marked "Plaintiffs' Exhibit B.")

140 (Mr. ABBOTT:)

Q. I wish you would look at this book and state what it is (showing), whether it is a record of your office and, if so, what the book is.

A. It is the tax record of 1891.

Q. Is it a record or the assessment roll?

A. It is the assessment roll or record, whatever you may term it.

Q. What volume?

A. 11.

Q. I wish you would turn to page 2481 of this record and at line 10 of that record, and tell the court whether this is a correct entry of the record.

Mr. JONES: We object to the witness testifying whether it is a correct entry unless he made it; it does not show that he knows anything about its correctness.

A. I did not receive this record, of course, from the assessor, and all a have to go by is what I see here.

Q. You received it from your predecessor in office.

A. Yes sir.

Mr. ABBOTT: We offer in evidence volume 11 of the Assessment Rolls of 1891, the same being the book just identified by the witness, and particularly we desire to offer what appears upon line 10 upon page 2481 which I will read into the record as "Plaintiffs' Exhibit C."

Mr. JONES: We object to that as irrelevant and immaterial, that the record as it now stands has not been identified as the original record of the assessment at that time, and part of the line referred to is in lead pencil and there are erasures and changes all over the

book and nothing to show that it is in the condition it was at
141 the time the assessment was made. *As* also object for the reasons that we objected to all the testimony in regard to this cause of action, and also ask leave at this time, if it should be found that there is any error of any officer making this levy and assessment, to have it amended by the court; and further object upon the ground that any immaterial error which might be found in such an assessment and the roll of that kind in the *lead pencil marks which* appear upon it could not affect the validity of the tax deed which is sought to be attacked in the first cause of action, and also as concluded by the judgment of the court in the cause in which this tax deed was issued, under our statute.

(Objection overruled.)

Mr. ABBOTT: On page 2481 of the book identified as the Assessment Roll of King county for 1891——

Mr. JONES: If we are going to read this into the record it should be read lead pencil marks so, and ink such and such——

Mr. ABBOTT: On line 10 under the head "Number of line" appears the figure 10.

Under the head "Name of owner" appears in lead pencil "C. Winehill."

Under the head "Number of lot" appears the figure 8.

Under the head "Number of block" appears ditto marks for "11" appearing above.

Under the head "Name of plat, addition or extension" appears the words "Maynard's plat."

Under the head "Value. Full value of each tract, lot or block of land assessed" appears in figures "25000."

142 Under the head "Full cash value of improvements on each tract, parcel, lot or block of land assessed" appears the figures 9000.

Under the heading of "Full cash value of each tract, parcel, lot or block of land assessed with improvements" appears the figures 34000 dollars.

Under the head "Total as equalized by the county board of equalization" appears the figures 34000.

Under the head "Full cash value as equalized by the State board of equalization" appears the figures 31500.

Under the head "State tax, county tax, sold re-l tax, military tax, State int.. county int.," with the various amounts in mills set forth, appears the figures 252.

Under the head "School tax, special district No. I 5.1," appears the words and figures 16065, and also the figures 189 erased in red ink.

Under the head "Total amount taxes on each tract, lot or block of land assessed," appears the figures 41265, and also in figures, erased in red ink 44100.

(Mr. ABBOTT:)

Q. Mr. McConnaughy, will you look at this book (showing) and tell the court what it is, whether it is a record of your office, and if so, what?

A. It is a record of my office.

Q. What is the record?

A. It is the tax roll.

Q. For what year?

A. 1891.

Q. Is it the original roll?

A. Volume 15.

143 Mr. JONES: Before this is used in evidence I want to ask the witness a question:

Q. I will ask you whether you know of your own knowledge that that is the original roll?

A. That is what it looks like, I don't know.

Q. Have you any other knowledge of it except that it is a record of your office?

A. That is all.

(Mr. ABBOTT:)

Q. It is the record which you received from your predecessor in office?

A. I suppose so; I never receipted for any books at all and I suppose that record was there; I don't know.

Q. You got this from your office?

A. Yes sir.

Q. It has been in your possession since you went into office?

A. It came from my office, and to the best of my knowledge it has been there.

Q. I wish you would look at page 3500 of the book which you just identified as volume 15 of the Assessment Roll of 1891 and state whether or not you observe any entries there in the form of certificates (showing).

A. I never saw them before, but I suppose that is what they are.

Mr. ABBOTT: If your honor please, I desire to offer in evidence page 3500 of volume 15 of the Assessment Roll of taxes of King county for the year 1891 just identified by the witness.

Mr. JONES: We object to the introduction of that page unless it is admitted in evidence that this is the final and last page of the assessment roll of that year.

144 Mr. ABBOTT: This purports to be the certificates of the county auditor of King county as to the rolls.

Mr. JONES: Do you admit that that is the close of all the tax rolls for that year? We have no objection to the admission of the certificates except the same objection that goes all through the record and which I do not suppose the court cares to have me repeat, but I

would like to have a ruling of the court that the general objection will run all through and an exception will be noted all through.

The COURT: Yes.

Mr. ABBOTT: I will read this certificate (reading).

"STATE OF WASHINGTON, }
County of King, } ss:

I, Frank E. Twichell, auditor of King county, State of Washington, do hereby certify that I received the Real Property Assessment Roll, being volumes 1 to 15 inclusive, to which the certificate is affixed of the taxable real property of said county for the year 1891, from the county assessor of said county, with his affidavit thereto affixed, on the 31st day of July A. D. 1891; that I have entered upon said roll all corrections directed by the county and State boards of equalization at their sessions for the equalization of taxes for the year 1891 to be entered upon said roll; that I have added the columns of valuations and acreage and that I have reckoned the respective sums due as taxes on said roll as required by law.

In testimony whereof I have hereunto set my hand and official seal of office this 9th day of December A. D. 1891.

F. E. TWICHELL,
Auditor of King County, State of Washington,"
with the seal of the auditor attached.

On the same page appears the following:

145 "STATE OF WASHINGTON, }
County of King. }

The State of Washington to Byron Phelps, county treasurer, Greeting:

In the name of the State of Washington you are hereby commanded to collect taxes charged in the real property assessment roll of said King county, being volumes 1 to 15 inclusive, for the year 1891, as required by law.

Witness my hand and official seal of office this 9th day of December A. D. 1891.

F. E. TWICHELL,
County Auditor of King County, State of Washington,
with the Seal of the County Auditor.

(Mr. ABBOTT:)

Q. Mr. McConnaughy will you look at this book and state to the court what it is and whether it is a record of your office (showing).

A. Yes.

Q. What is it?

A. The tax roll.

Q. I wish you would identify it definitely and state to the court just what tax roll it is.

A. It is the Redemption and Forfeiture Record.
Q. Of what?
A. King county.
Q. For what year?
A. 1891.
Q. I wish you would state definitely whether it is or is not, so that the court may know.
A. I have no doubt that is what it is; it is 1891.

(Mr. JONES:)

Q. Do you know of your own knowledge that that is the book which you say it is?
A. No, I just suppose it is.
146 Q. Have you any other knowledge in regard to it than that it is some book that has come out of your office?
A. That is all.

(Mr. ABBOTT:)

Q. It has been in your possession ever since you have been in office.
A. I don't think I ever seen it since I have been there, but I suppose it was.
Q. You received it from your predecessor?
A. I don't know. There was no list made of the books. I took what seemed to be there—I suppose it was there.
Q. This appears in your office to be the record which you stated to the court that it is.
A. Well, it is supposed to be the record.

(Mr. JONES:)

Q. Do you know anything about—did you ever see it before?
A. Well, I probably have years ago, but I don't think I saw it since I have been in office because I did not have any occasion to look at it.

Mr. ABBOTT: We offer in evidence from the Tax Judgment Sale and Redemption and Forfeiture Record of King county, Washington for the year 1891, line 23 on page 377, which reads as follows——
Mr. JONES: We object as not properly identified and as irrelevant and immaterial and we make the same objection that we made before, and ask leave at this time, if it should be found—if there is any error that appears in this record, that the court will amend it *nunc pro tunc*, as provided by the statute, and also the same objection that runs to all the testimony.
(Objection overruled.)
147 Mr. ABBOTT: This reads as follows:
Under the head of "Name of owner" appears C. Winchill.
Mr. JONES: We object to that reading of it on the ground——
Mr. ABBOTT: You may make your objection when I get through.

Mr. JONES (continuing): On the ground that the letter which he reads as "C" is an "E" and that it is "Winehill."

Mr. ABBOTT: We will show by subsequent testimony which we will introduce that the record has been changed; that originally it read in ink as read by me Winchill.

Mr. JONES: Then you admit that it now reads Winehill.

Mr. ABBOTT: I do not.

Mr. GILMAN: I think the court will determine what it reads on line 23.

(Objection overruled.)

Mr. ABBOTT (reading): Under the head of "Number of lot" appears the figure 8.

Under the head "Number of block," appears the figure 11.

Under the head "Name of plat, addition or extension," appears ditto for "Maynard's plat" appearing above.

Under the head "Valuation," appears the figures 31500.

Under the head "Taxes dollars and cents," appears the figures 41265.

Under the head "Penalty," appears the figures 4127.

Under the head "Interest," appears the figures 19973.

Under the head "Costs," appears the figures 05 in the cents column.

Under the head "Total amount of judgment," appears the figures 65370.

148 Under the head "Amount paid before rendition of judgment, remarks, to whom sold and the amount paid before sale and after rendition of judgment," appear the words "Sold to King county."

Under the head "Date of sale, month," appears ditto under the figure 6.

Under the head "Day," appears ditto under the figures 15.

Under the head "Year," appears ditto under the figures 94.

Under the head "Amount sold for," appears the figures 65370.

Under the head "Number of tax certificate," appears the figures 260.

Under the head "What portion sold," appears ditto for the word "all" appearing above.

Under the head "To whom assigned," appears the name H. C. Taylor.

Under the head "Date of assignment," under "month," appears the figure 2.

Under the — "Day," appears the figure 6.

Under the head "Year," appears the figures 95.

Under the head "Amount of assignment," appears the figures 74086.

Under the head "Remarks or receipt for redemption money" in red ink appears "Deed No. 64."

Under the head "Date tax deed, date receipt redemption money," under the word "month," appears the figure 2, and under the word

"day," appears the figures 13, and under the word "year," appears the figures 97."

149 Mr. ABBOTT: We offer Plaintiffs' Exhibits "F" following appearing on page 464 the same roll.

"STATE OF WASHINGTON, } ss:
County of King, }

I, T. W. Gordon, county clerk and clerk of the superior court in and for the county of King, State of Washington, do hereby certify that the foregoing is true and correct record of the delinquent real estate in said county against which judgement and order of sale was duly entered in the superior court of said county on the 14th of May, 1894 for the amount of taxes, asses-ment, penalty interest and costs due severally thereon, as therein set forth, and that the judgement and order of court in relation thereto fully appears in said record.

T. W. GORDON,
Clerk of the Superior Court,
By E. D. WHITEMORE,
Deputy Clerk,
with the Official Seal of the Clerk.

Mr. JONES: We make the same objection as stated before that the offer is only a part. The instrument of which it is a part begins on page 457 and the part read by counsel is simply the final certificate.

Mr. GILMAN: I think that objection is well taken and we will introduce the judgement as well.

Mr. JONES: We have no objection to the judgement going in.

Mr. ABBOTT: Then we will introduce pages 466, 467, 468, and 469.

Mr. JONES: We consent that the description of the property in here, except the one piece of property referred to, may be omitted.

Mr. ABBOTT: I offer in evidence the following appearing on page 467 of the same roll (reading)

150 STATE OF WASHINGTON, } ss:
County of King, }

I, A. P. Mitton, treasurer of King county, State of Washington, do solemnly swear that the foregoing is a true and correct list of the delinquent lands and lots within King county, State of Washington, for the year or years therein specified upon which I have been unable to collect taxes, assessment, penalty, interest and cost charged thereon as required by law, and that said taxes now remain due and unpaid as I verily believe.

A. P. MITTON,
Treasurer King County, State of Washington.

Subscribed and sworn to before me this 14th day of May, A. D. 1894.

FRANK H. HALL,
Notary Public for the State of Washington,
Residing at Seattle, King County."

By consent of counsel it is agreed that the Judgement Roll, page 467 and the following pages and the certificate may go in and may be copied by the stenographer subsequently (marked Exhibit " I.")

Mr. JONES: We consent that they may go in.

We desire to ask the court to amend any misdescription which occurs in the description of this property or the party owning it upon this judgement roll, *nunc pro tunc*, and we desire at this time to move to strike from the evidence in this action all the preceeding evidence relating to the preliminary step of levy, assessment, listing and certifying to the county auditor, and each step which has been introduced up to this judgement roll. We base this upon the statutes of 1893 upon which this judgement was issued, section 105 — which provides for such correction. The statutes of 1889-90 under
151 which this property was assessed providing for the asses'-ment of real estate *in rem* and there was no provision for the asses-ment of real estate to the property owners.

(After hearing argument the court takes a recess until 1:30 p. m.)

152 Afternoon Session.

1:30 P. M.

(After further argument the court rules as follows :)

The COURT: I am inclined to hold that that late decision of the supreme court that you have read is controlling upon this court as to that point that the act of 1889 and the act of 1895 are substantially the same; the provision both being that the taxes shall be asses-ed to the property and not to the owners. I will give you gentlemen time, if you wish, to consider whether or not the deciding of this motion is a disposal of the case, or of that branch of the case.

Mr. GILMAN: You mean in case your honor should sustain this motion and hold that this asses-ment and the sale is good ?

The COURT: Yes.

Mr. GILMAN: I did not catch your honor's suggestion at first.

The COURT: The motion before me, as I understand it, is to exclude all the other evidence before the introduction of the judgement. I am inclined to hold with Judge Brinker and Mr. Jones that the court is bound by this decision. I have not considered, however, as to whether or not holding that to be the law that I should exclude the other evidence.

Mr. GILMAN: Does the court understand that this decision says that in the revenue law prior to 1895 the name of the owner was essential.

The COURT: I am aware that that decision says that and I am inclined to treat that portion of what the court says as dictum and not binding upon the court. I am inclined to think that they had in mind not the conditions of the law as it stood from 1889
153 on but the condition of the law prior to that time when the former decision was rendered. The trial court is not bound by what they say in which they did not decide the case. What they said in that case is that it is not necessary to a valid asses-ment that the name of the owner should be inserted in the notice or in the asses-ment of 1895.

Mr. GILMAN: I think that will dispose of the case.

Mr. ABBOTT: The basis of this case is that the plaintiffs were laboring under a mistake when they gave the quit claim deed, believing that the title had been absolutely lost to them by virtue of the tax proceedings. Now if your honor holds that the tax proceedings are valid, of course our position that we were laboring under a mistake could not be maintained.

This matter was argued upon demurrer to the complaint and the court at that time held that the matter set up in the complaint showed an invalid asses-ment. Now we are offering to prove the allegations of the complaint and we are not offering anything which has not been set out in the complaint.

Mr. JONES: The judgement is not set out in the complaint.

The COURT: In that case it is not decided—the question was not before the supreme court as to whether or not it was necessary in the notice that the name of the party should be inserted. I would hear from you further upon that point—it has been sometime since I read that case.

Mr. JONES: To make it plain to the court in that connection Mr. McConnaughy testified that he served a copy of that notice upon Mr. Knox, and they allege in their complaint that this man Knox was the agent of the plaintiff.

154 Mr. GILMAN: Can you serve process on an agent?

Mr. JONES: When the principal is out of the State the statutes provide for it.

Mr. ABBOTT: We are prepared to argue this point fully to your honor that the notice which the defendants gave as shown by their own affidavit and the records in this case were not such notice as the statutes required and Mr. McConnaughy in his own affidavits, which have been introduced, says that he served this paper—that he gave notice of his application for a tax deed to the owner of the property, to wit: G. Winehill and Mattie Ford and further more they admit in their answers to our interrogatories that they knew Sarah Woodward was the owner of this property at the time they made the application for the tax deed, and that we will be able to show.

Now the question is one which comes up as a surprise to us because we supposed the question of the tax title had been disposed of under the former holding and we have not yet submitted anything except the judgement order which is not set up in the record, and we

are willing to prove the condition of the record and that these parties had the knowledge at the time when they made the application that the plaintiff was the owner. There are other steps in the effort to secure title on the part of the plaintiff which have not been complied with and we have only addressed ourselves to that one. We are prepared to argue the question fully upon the law and upon the facts, that the requirements of the statute were not complied
155 with it in the attempt to secure this title.

I want to call the court's attention to one rule of law which I think it is proper at this time to advert to. We have alleged that at the time when this transaction occurred this property was worth forty thousand dollars and the allegation is—admitting all that the defendants claim to be the fact—that they paid the sum of $1500.00—we do not admit that but assuming that it is true—the value of the property was $40,000.00 and the amount paid for it at that time was $1500.00. Now the authorities all are that where the inadequacy of consideration is so gross as to shock the conscience, the chancel-or will be very liberal in allowing the introduction of testimony.

The COURT: Would your cause of action be material to you if you should fail in setting aside the tax sale?

Mr. ABBOTT: We expect to be able to show other facts and other inequitable incidents, but if they have a good tax title we think it would be practically disposing of the case. We might set aside the quit claim deed but there would be the tax deed standing against us. I don't think there can be any question but what the records here will sustain everything we have set out in the complaint, and having proceeded thus far in preparing this case upon the theory that the demurrer to the complaint was not well taken and that the first cause of action stated a cause of action as was stated by your honor, we think we are entitled to prove all the facts that we have alleged.

The COURT: I will adjourn court until tomorrow morning
156 and give you gentlemen an opportunity to consult in this matter.

(Here the court adjourns until tomorrow morning at 9:30 a. m.)

157 TUESDAY, June 3rd, 1902, 9:30 a. m.

Mr. ABBOTT: As I understood the motion that was made it is to strike — all the evidence we have introduced relative to the assessment, levy or collection of these taxes. I would ask your honor whether, in your honor's view, it extends also to the exhibits which were previously offered, as to the form of the notice and the application for the deed. If so I desire to be heard.

Mr. JONES: We specially limited it so as not to ask for anything except that which was preliminary to the judgement; and the notice and the tax deed are matters following the judgement.

Mr. ABBOTT: With that understanding that nothing is involved in this motion except the matter which is incorporated in the record

up to the time of the entry of the judgement, we desire to proceed further in our case. I did not understand that your honor had ruled definitely and we would like to take your honor's ruling on the point that was submitted.

The COURT: I will grant the motion.

(Exception noted for plaintiff.)

Mr. JONES: We ask the court at this time to dismiss this case of its own motion. We think the showing which has been made in the evidence up to this time and the ruling of the court upon this vital question and which is admitted to be vital, and the statements which counsel made yesterday is such that it is the duty of the court to dismiss this case at this time of its own motion on the ground that no court will do an idle thing. No court will try a case
158 from which no result can be had. It has been ruled by the Supreme Court of the United States and by all the authorities that where counsel had made a statement to the court which shows, and practically admits that no cause exists that the court will not proceed further with the trial. Counsel stated yesterday that if this ruling of the court was as the court has now ruled, that their tax title fell, that that would dispose of the case and they would not proceed further.

Mr. ABBOTT: I beg to correct counsel.

The COURT: I don't think Mr. Gilman's statement went to the effect that they would not proceed further. I think the statement went to the effect that they thought that they might not.

Mr. GILMAN: I think I can state just exactly what occurred. Your honor before making the ruling, asked counsel generally whether or not if the court sustained this objection and granted this motion, it would dispose of the case. I think I expressed my opinion that it would, that is to say, that in my judgment, if these defendants have a good tax title or any kind of a good title as against these plaintiffs, the defendants must prevail; then the court suggested that we take time to consider until this morning, and withheld the ruling. So far as concerns the case of EsKenyon vs. The Arms Company, I am very familiar with that case. It was tried by my old preceptor the dean of the Columbia Law School. It went out on the opening statement to the jury. I am urging that this tax title is invalid, but the court has taken, as I understand, a different view of that question. I am not here admitting that we have
159 no case. We have urged before the court all the time that this tax title is invalid, but if the court takes a different view we must bow to the ruling of the court.

Mr. JONES: We ask the court at this time to dismiss the case, of its own motion, on the ground that the evidence so far discloses that granting the judgment to be good, there is no valid objection to the deed; and secondly upon the ground that statements of counsel have practically conceded that the last motion which the court granted concludes the case.

The COURT: I will deny the motion.

Mr. GILMAN: Now that I may understand where we are at. The motion was as I understood it, to exclude all evidence that was introduced prior to the judgment.

Mr. JONES: The motion was to exclude all evidence of the taxing steps which lead up to the judgment. The other evidence was not excluded.

160 McCONNAUGHY, recalled, testified as follows:

(Mr. ABBOTT:)

Q. Mr. McConnaughy, have you the original tax deed which you received for the purchase of this property?

A. I presume I have it some place among my papers but I don't know exactly where.

Mr. ABBOTT: I will state to the court that we have made demand upon the parties to produce that deed and we would like to have it produced if counsel will admit that the copy set out in the complaint is correct we might use that.

Q. Have you a certified copy of the tax deed?

A. I asked for one in the auditor's office, and I think it is prepared by this time—they did not get them all out yesterday.

Mr. ABBOTT: In the meantime I offer now for the consideration of the court the form of the tax deed as set out in the complaint and ask leave to verify it by a certified copy from the county record, and I will proceed with the understanding that this is a correct copy of the deed as set out in the complaint and we will verify that fact by subsequently introducing the deed itself or a certified copy.

(Mr. ABBOTT:)

Q. Mr. McConnaughy, I will ask if you have the original tax receipt for the years 1894–5–6 for taxes which you paid for those years?

161 A. Well I have them some place, I don't know just where I tried to find them the other day in my desk—I could not find them.

Q. Do you know when you paid taxes for 1894–5–6?

A. I could not tell without looking, no sir.

Q. We made demand for the original tax receipts for the taxes for the years 1894–5–6 as paid by the defendant?

A. I can get the copy of the records.

Mr. JONES: What is the relevancy of that?

Mr. ABBOTT: I ask counsel whether he will admit that the taxes of 1894–5–6 were not paid previous to the issuance of the tax deeds.

Mr. JONES: I refuse to admit it.

Mr. ABBOTT: I ask to have the tax receipts produced.

The COURT: I think you should have made the demand for the papers you needed.

Mr. ABBOTT: We made the demand for all papers in connection with this transaction and the original tax receipts were submitted upon an inspection of the vouchers and we demanded that they produce all the vouchers in support of that statement.

The COURT: You may proceed—what year do you mean?

Mr. ABBOTT: We have alleged in the complaint as one of the reasons why the tax deed itself was improperly issued that the defendants did not before the issuance of the deed pay all the taxes subsequently levied after the years 1893 and it is alleged that they did not pay those taxes until after the acquirement of the deed. Those vouchers were exhibited to me but a few days ago.

The WITNESS: You made the statement to me personally
162 in my office that you did not care to see any more of them and the certified copies were all that you cared for.

Mr. ABBOTT: That was the original papers which have no reference to these items.

The WITNESS: I told you they were there if you wanted them and you said you would not care for them. I told you I did not know where part of my tax receipts were at that time.

Mr. JONES: Will you show me any place in the law which requires the payment of all taxes?

Mr. ABBOTT: I do not care to argue the law to you—I will argue it to the court.

Mr. JONES: I object to it as irrelevant and immaterial and incompetent.

The COURT: The owner did not redeem?

Mr. ABBOTT: No.

The COURT: I think it is immaterial and incompetent as to whether it was paid prior or subsequent and I will sustain the objection.

(Exception noted for plaintiff.)

Mr. GILMAN: If I understand the record that is made on this. We demanded the production of these tax receipts, having previously made the demand therefor, that the defendants refuse to produce them and the court r[illegible]uses to order them produced.

The COURT: I do not under[illegible]nd that any previous demand has been made for them.

Mr. GILMAN: Yes, a previous demand has been made previously in the case a statment was made of the expenditures on the property; included in that statement was taxes for the year for which we ask the receipts; in the demand served before the trial
163 we asked for the vouchers—for the statement of expenditures upon the property up to a certain date—we asked for the vouchers showing those expenditures. If the court holds these things are immaterial I only desire that the record may be properly made.

The COURT: You may have the record made under the statement of counsel that the owner did not redeem the property—I consider the production of these receipts as immaterial.

(Exception noted for plaintiff.)

Mr. ABBOTT: On the question of the tax deed we want that clearly understood. I understand the court has permitted the copy set out in the complaint to go in pending the production of the certified copy.

Mr. JONES: We are willing, but we want our objection in as irrelevant, immaterial and incompetent and we ask the court at this time that if any errors of any officers whose duties were connected with the making of this deed should be discovered, to amend the deed so as to conform with the fact and with the law.

The COURT: As relating to any other case than this I have doubt whether I can go into another matter and make corrections. If any corrections be made applications should be made in the other case not in this case.

Mr. JONES: I think the statute is broad enough to give the court authority to make amendment at any time when the question is raised to make corrections. We claim that as long as it does not affect the substantial justice of the taxes itself the court will
164 make such amendment.

Mr. ABBOTT: If the court please we offer in evidence the certified copy of a warranty deed from Fred E. Sander and wife to Henry S. Woodward of this property, being the original deed vesting the title in them.

Mr. JONES: I object to that as irrelevant, immaterial and incompetent, and the mere introduction of the deed does not of itself show title, and further it is irrelevant, immaterial and incompetent in the trial in this first cause of action.

(Objection overruled, documents marked "Plaintiff's Exhibit G.")

Mr. ABBOTT: We do not wish to unnecessarily take up the time of the court and, therefore, we wish to say to the court that so far as the first cause of action is concerned we have not anything further to offer in the way of original evidence—we are prepared, however, to go on with the other cause of action.

Mr. JONES: We ask the court at this time of its own motion, to dismiss the action on the ground that the plaintiffs have made no showing and nothing has come before the court and the court will not take up time unnecessarily in a trial of this kind.

The COURT: I think that motion should come from the defendant. The court generally gets into trouble enough without going out of its way to make it on its own motion.

Mr. ABBOTT: I understand the motion is denied.

The COURT: I will deny the motion.

Mr. ABBOTT: If the court please I desire to offer in evidence
165 that portion of the deposition of Sarah Woodward taken in the city of San Jose California, before J. R. Lewis, a commissioner, and certified under his hand April 2, 1901—that portion I will read and the exhibits thereto attached.

Mr. JONES: We object to the offering of a portion of the deposition, and we further object to the offering of any portion of this deposition

on the ground that it was taken in another case. It was taken in cause No. 31309 in this court for the purpose of perpetuating the testimony of Sarah Woodward and it cannot be introduced until the showing is made that the witness could not be put on the stand.

Mr. ABBOTT: I will withdraw the offer for a few minutes.

166 EDWARD CUDIHEE, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Mr. JONES: This testimony is on the second cause of action.

Mr. ABBOTT: This relates to the third cause of action.

(Mr. ABBOTT:)

Q. State your name?

A. Edward Cudihee.

Q. What position, if any, do you hold?

A. Sheriff of King county.

Q. I will ask you if, as sheriff of King county, you have within your possession any records relative to the issuance of a tax deed to D. F. McConnaughy as sheriff of King county on the 24th day of April A. D. 1899 to the property described as follows: "Lot 8 in block 11 of D. S. Maynard plat of the town, now city of Seattle"?

A. Well I don't know.

Q. I will ask you if you have received a *subpœna duces tecum* to produce certain documents in this matter?

A. No sir, I received no subpœna.

Q. I will ask you if I did not myself personally hand you a copy of such a paper on Friday last?

A. A subpœna?

Q. Yes.

A. If I remember right you handed it to my deputy.

Q. Didn't I hand it to you and you turned it over to him?

A. Well it may be possible you did, I did not understand it was a subpœna, I thought it was a——

Mr. ABBOTT: Well I ask the witness now to produce the document referred to in the *subpœna duces tecum* served upon him last Friday in this matter.

A. I remember the occasion now, in my office.

167 Mr. ABBOTT: With the permission of the court the witness may be excused for the purpose of getting information. And if the court please I desire now to offer in evidence a deposition of certain parties taken in this cause at the city of San Jose on the 10th day of May 1902 before John H. Yole, notary public in and for Santa Clara county, State of California under a stipulation between the parties.

Mr. JONES: Depositions of whom.

Mr. ABBOTT: Depositions of J. R. Lewis, H. J. B. Wright and H. B. Gates.

Mr. JONES: We object to the further introduction of any testimony in this cause on the ground that on the evidence before the court and the statement made by counsel, there is nothing to be tried by the court in this case and nothing left at issue, and I would like to have that objection run right through the record, and we object to the introduction of these depositions as irrelevant and immaterial upon their face.

The COURT: Upon the statement of counsel that the case would be determined if the first cause of action should fail I will hear from the plaintiff- why this objection should not be sustained.

(After argument upon the motion the court sustains the objection and an exception is noted for plaintiff-.)

Mr. ABBOTT: Now if your honor please I ask the further hearing of this matter be continued until 1:30 o'clock.

(Court takes a recess until 1:30 p. m.)

168 SEATTLE, WASH., June 3, 1902.

Mr. GILMAN: As I understand the ruling of the court, it sustains the objection to the introduction of any further testimony whatever. Is that as you understand it Mr. Jones?

Mr. JONES: Any further evidence upon any cause of action than the first cause of action which has been introduced, and the court sustained the objection to it. I understand you rested on your first cause of action. In fact I think Mr. Abbott made the statement to the court that that was all the evidence you had to introduce on the first cause of action.

Mr. GILMAN: I want to get that record clear.

Mr. JONES: I don't think there is any question about it. Mr. Abbott stated that he had introduced all his evidence on the first cause of action.

Mr. ABBOTT: The statement that was made was not as though we had rested our case. It was simply a general statement that I was going to proceed to the other causes of action; it wasn't with the expectation of being absolutely precluded from considering the first cause of action any further. I think the previous statement was that in view of what had been said in regard to the first cause of action, that we would now proceed to the second cause of action, but we did not rest our first cause of action, because we would have the right to introduce evidence on any of our causes of action.

The COURT: I first understood you to say the case would depend upon the first cause of action, and if the first cause of action was decided against you that the case was lost. If you have any other evidence on the first cause of action I will hear you, if not I
169 think it would be useless to take up the time of the court on the other causes of action if the objection was sustained to the first.

Mr. JONES: We appeal to the record to show that Mr. Abbott, the leading counsel for the plaintiff-, expressly stated to the court that he had no other evidence to introduce.

Mr. ABBOTT: I am willing to stand by the record whatever it was.

Mr. JONES: Judge Brinker made a note at the time and I think the reporter's notes will sustain him——

Mr. ABBOTT: The court has the right to allow us to introduce any evidence and our statement was simply made to inform the court that we were now going to—coming to another cause of action.

Mr. GILMAN: I want to get the record clear, that the court shuts out any further evidence upon the view that if the tax title is sustained, of course the defendants have title and the fact that he had a quit claim deed or had purchased at judicial sale would not add to that title. I want the record made clear that we are standing here ready to introduce evidence on our second, third and fourth causes of action.

Mr. ABBOTT: As this (showing) was the document upon which this objection was made, I desire to have the paper marked as Plaintiffs' Exhibit for Identification, being the deposition referred to.

Mr. JONES: There is no objection to that.

(Documents marked "Plaintiffs' Identification H.")

Mr. ABBOTT: Also the deposition of Sarah Woodward
170 which was taken before Judge Lewis, I also desire to offer that as Plaintiffs' Identification.

(Document marked "Identification I.")

The COURT: There may be no questions about this. If you have any further evidence on the first cause of action, I will hear you now.

Mr. JONES: I would like an exception to the ruling of the court.

Mr. ABBOTT: We propose to offer one small item in connection with the first cause of action.

Mr. JONES: I desire to say that we except to the ruling of the court for the reason that Mr. Abbott, the leading counsel for the plaintiff-, after offering the deed from Fred E. Sander and wife to Henry S. Woodward, objection being made thereto and the same overruled and an explanation being made in regard thereto, announced that he had no further evidence under his first cause of action. The memorandum thereof was made by Judge Brinker counsel for defense on a regular memorandum that he was making at that time and it so appears on the record.

Mr. GILMAN: Now if the court please I do not think there is any further testimony material to the first cause of action to be introduced. The court has excluded the introduction as I understand, of any further evidence whatever, or any evidence whatever, to support the second, third and fourth causes of action and we must bow to the ruling of the court.

Mr. JONES: We ask the court at this time to dismiss the action of

its own motion on the ground that there is nothing further
171 to be heard by this court, and the court will not try moot cases nor moot issues.

The COURT: Very well, I will grant the motion.

Mr. GILMAN: Is it the order of the court to dismiss the case of your own motion?

The COURT: I will dismiss it upon what has occurred.

Mr. GILMAN: To the order of your honor dismissing the case we desire to ask an exception.

The COURT: The exception is noted for the plaintiff-.

Mr. ABBOTT: Now the order as I understand it, will be entered as of today.

The COURT: Yes.

Mr. ABBOTT: We desire now in open court to give notice of appeal from the order.

The COURT: Very well, the clerk will make a note of the fact that the plaintiff- gives notice of appeal to the supreme court of the State of Washington.

Mr. JONES: I desire to make the amendments which *was* allowed on the original answer by interlineation.

172 PL'FFS' EXHIBIT "I."

In the Superior Court, King County, State of Washington.

In the Matter of Application of A. P. MITTEN, as County Treasurer of King County, State of Washington, to the Superior Court of said County and State for Judgement for Sale for Delinquent Taxes for the Year 1891.

Whereas due notice has been given of the intended application to this court for a judgment against the lands and lots hereinbefore in this record described (which record consists of this volume two and volume one, of the Tax, Judgement Sale, Redemption and Forfeiture Record for the Year 1891) and no sufficient evidence having been made or cause shown why judgement should not be entered against said lands and lots for taxes, assessments, interest, penalties, costs due and entered thereon for the year herein set forth, to wit the year 1891 (except objections for the sale of lands, and lots hereinafter described, which objections the court will consider at some future time) therefore it is considered, adjudged and decreed by this court that judgment be and the same is hereby entered against all of the aforesaid and aforementioned and described tracts, parts of tracts, lots, parts of lots, and lands in this record described, which said record consists of this volume number two and volume number one, of the Tax Judgment Sale, Redemption and Forfeiture *and* Record for the Year 1891 except the lots parts of lots tracts, parts of tracts and lands objections against *which* the sale of which have been filed

and will be considered by the court at some future time, which said lots parts of lots, tracts, parts of tracts and lands excepted from this judgement, *or* described as follows, to wit

Lot 8, block 11, Maynard's plat of the town, now city of Seattle, (also describes other property,) and except the lands and lots upon said record marked paid in favor of the State of Washington for the total sum in said record annexed to each tract part of tract, lot, part of lot, and lands, the same being the total amount of taxes, assessments penalties interest, and costs due severally thereon, and it is ordered by the court that the said several tracts, parts of tracts and parts of lots and lands except those against the sale of which objections have been made as aforesaid and those marked paid upon said record as aforesaid or so much of each of them, as shall be sufficient to satisfy the amount of taxes, assessments, penalties, interest and costs, annexed to them severally be sold as the law directs and on the sixth day of June, 1894.

Dated this 14th day of May 1894.

R. OSBORN, Judge.

Attest: F. M. GORDON, Clerk.

STATE OF WASHINGTON, } ss:
County of King, }

I, T. W. Gordon, county clerk, and clerk of the superior court in and fore the county of King, State of Washington, do hereby certify that the foregoing is a true and correct record of the delinquent real estate in said county, against which judgement and order of sale was duly entered in the superior court of said county, on the 14th day of May, 1894, for the amount of the taxes, assessments, penalties, interest and costs due severally thereon, as therein set forth, and that the judgement and order of court in relation thereto fully appears on said record.

[Seal of the Superior Court of King County, Washington.]

T. W. GORDON,
Clerk of Superior Court,
By E. D. WHITTEMORE,
Deputy Clerk.

173 In the Superior Court, King County, State of Washington.

In the Matter of the Application of A. P. MITTEN, as Treasurer of *the* King County, State of Washington, to the Superior Court of said County and State for Judgment for Sale for Delinquent Taxes for the Year 1891.

Now on this 14, day of May 1894 the foregoing application (as set forth in the first volume of this record) of A. P. Mitten, as county treasurer, of King county, State of Washington, coming on regularly

and duly to be heard, and the court having examined the foregoing list and record and being fully advised, in the premises it is ordered by the court that judgement, be and the same is hereby entered against all the tracts, parts of tracts, lots, parts of lots, and lands in this volume number 2, and volume number 1, described (except those herein after mentioned) in favor of the State of Washington, for the sum annexed to each of the foregoing described tracts, parts of tracts, and lots, parts of lots, and lands, the same being the total amount of taxes, assessments, penalties, interest, and costs, due severally thereon, and it is further ordered by the court that the clerk of this court be, and he is hereby, directed to make out and enter an order for the sale of all the real estate herein before — in this record, to wit: This volume 2 and volume 1, of the tax judgement sale, redemption and forfeiture records for the year 1891 described, except that herein after in the order described by the court to be made and entered by the clerk of said court described against the sale of which objections have been made as set out in said order.

Dated this 14th day of May, 1894.

R. OSBORN, Judge.

174 STATE OF WASHINGTON, } ss:
County of King, }

I A. P. Mitten treasurer of the county of King, State of Washington, do solemnly swear that the foregoing is a true and correct list of the delinquent lands and lots within the county of King, State of Washington for the year, or years, therein specified upon which I have been unable to collect the taxes, assessments, penalties, interests and costs charged thereon as required by law and that said taxes now remain due and unpaid, as I verily believe.

A. P. MITTEN,
Treasurer of King County, Washington.

Subscribed and sworn to before me this 14th day of May A. D. 1904.

FRANK H. PAUL,
Notary Public for the State of Washington,
Residing at Seattle, King County.

175 [Endorsed:] Duplicate No. 31864. 4429 In the superior court of King County, State of Washington. Sarah Woodward *et al.*, plaintiff-, v. H. C. Taylor, *et al.*, defendants. Plaintiffs' proposed bill of exceptions or statement of facts Filed Nov. 7, 1902 C. S. Reinhart clerk Copy J. B. Filed Jul- 1 1902 C. A. Koepfli clerk This statement returned July 29th, 1902 R. S. Jones (29th) Bowman, Bolster & Eaton, court stenographers, Seattle, Washington.

176 Treasurer's Office, King County, Washington.

SEATTLE, Mar. 1, 1901.

Received from A. F. McClaine two hundred sixty-four & 85/100 ($264–85/100) dollars as a conditional deposit for certificates of delinquency. If found for any reason that certificates can not be issued money to be refunded without interest.

CHARLES F. WHITTLESEY,
(Stamped over above name is the name of J. W. McConnaughey.)
As County Treasurer,
By BENJ. C. LEVY, Dep'y.

Exhibit "A."

Indorsed: 31864. Department No. 1. Plaintiffs' Exhibit A. Filed Jun- 2 1902 C. A. Koepfli, clerk, S. S. W.

EXHIBIT "B."

STATE OF WASHINGTON, } ss.
County of King, }

J. W. McConnaughey being first duly sworn on oath deposes and says that he is the duly elected and qualified and acting treasurer of said county of King; that he has examined the records of his office and that the annexed papers and documents are true and correct copies of the original papers and documents on file in my office as the said treasurer of said King county.

Witness my hand and official seal as treasurer of King county, State of Washington, this 28th day of May, 1902.

J. W. McCONNAUGHEY,
[SEAL.] Treasurer of King County.

177 (Issued under section 134 Revenue act—1893.
$740.86.

Certificate of Purchase.

STATE OF WASHINGTON, } ss:
County of King, }

No. 260.

In the name of the State of Washington:

I, A. P. Mitten, treasurer of King county said State do hereby certify that at a sale of real estate held at the front door of the court house in the said county (of which notice was duly and regularly given) on the 15th day of June, 1894, pursuant to the order and judgment of the superior court of said King county, Washington, duly made and entered in the tax judgment, sale redemption and forfeiture record in said court on the 14th day of May, 1894, in pro-

ceedings duly and regularly had therein, on application of undersigned as treasurer of said county for judgment for sale of the delinquent lots and lands in said application described for the delinquent taxes for the year 1891, together with the interest, penalties and costs due thereon, the following described lots, pieces, tracts and parcels of land situated in said county, to-wit, lot 8 block 11 Maynard's plat, were on the 15th day of June, 1894, between the hours of 10 o'clock a. m. and 3 o'clock p. m. offered for sale, whereupon there being no bidders therefor, the same was sold and forfeited to said county of King for the amount of taxes, assessments, interest, penalties and costs due thereon, to-wit, four hundred and twelve 65/100 dollars taxes, forty-one 27/100 dollars penalty, one hundred and ninety-nine 73/100 dollars interest, and 5c costs, making a total of six hundred fifty-three 70/-00 dollars due thereon as aforesaid, the same being the amount for which said land was sold and forfeited to said King county.

And whereas, H. C. Taylor of Seattle, Wash., has applied to the undersigned as county treasurer of said county to purchase the above described land and has paid to such treasurer the sum of seven hundred and forty 86/-00 dollars the same being the total amount
178 due upon said land and for which the same was sold and forfeited to the county of King, as aforesaid, together with the penalties, interests and costs on all taxes heretofore forfeited.

Now, therefore, in consideration of the premises aforesaid, the said county of King does remise, release and set over unto the said H. C. Taylor all of its right, title and interest of, in and to the said described real estate and each and every part thereof, provided, however, that said property is sold subject to redemption according to law in such cases made and provided. And the holder of this certificate will be entitled to a deed from the treasurer of said county for said real estate at any time after the expiration of two years from the date of said sale if the same be not redeemed within said time.

I further certify that the holder of this certificate must take out a deed for said land and file the same for record within one year from and after the time he is entitled to such deed, otherwise this certificate and any deed he may receive thereon and the sale on which this certificate is based will be null and void; provided, however, that if the holder of this certificate shall be prevented from obtaining such deed by an injunction or order of any court or by the refusal of the treasurer to execute the same, that the time he is so prevented shall be excluded from the computation of such time.

Witness my hand and official seal this the 6th day of February, 1895.

A. P. MITTEN,
Treasurer King County, Washington,
By JNO. RIPLINGER, Deputy.

179 STATE OF WASHINGTON, } ss:
County of King, }

J. W. McConnaughey, being first duly sworn, on oath deposes and says: That he is the agent of H. C. Taylor, the person whose name is subscribed to the notice of application for tax deed, a copy of which is hereto annexed; that he has made careful and diligent search and inquiry for the person in whose name the lot in said notice described was taxed, and find- the same to have been taxed to C. Winchell and for the owners of and persons interested in said lot, viz. Gustave Winchell & Mattie Ford who are named in said notice and to whom said notice is addressed, and that said persons cannot be found in said county of King, State of Washington; that he published the original notice of which the attached is a true copy in the Argus, a newspaper of general circulation in said county of King in which the land in said notice described is situated; that said notice was inserted three times in three regular and separate editions of said newspaper, the date of the first insertion and publication being on the 2nd day of Jan'y 1897, the date of the second insertion and publication being on the 9th day of Jan'y 1897, and the date of the last publication being on the 16th day of Jan'y 1897, the first publication being not more than three months and the last not more than one month prior to the date of expiration of the time of redemption of said property from said tax sale.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11 day of Feb'y 1897.

[SEAL.] R. S. JONES,
Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

180 STATE OF WASHINGTON, } ss:
County of King, }

A. T. Ambrose, being first duly sworn, upon his oath deposes and says: That he is business manager of the Argus which is a weekly newspaper, which before and at the time hereinafter stated and included was published at the city of Seattle, in the county of King, and the State of Washington, once a week as a weekly newspaper and was during all said time of general circulation in said county of King and that the notice of which a printed copy is hereto attached was published in full in said newspaper and in every issue thereof for three consecutive issues, which said printed copy was always a precise counterpart and fac simile of the notice so published and that the date of the first publication as aforesaid of said notice was the 2d day of January, 1897, and the date of the last publication thereof was the 16th day of January, 1897.

A. T. AMBROSE.

Subscribed and sworn to before me this 23rd day of January, 1897.

T. H. CANN,
Notary Public in and for the State of
[NOTARIAL SEAL.] Washington, Residing at Seattle.

181 Notice.

To L. Gemechi:

You, as the person in actual possession and occupancy of the lot hereinafter described, are hereby notified that the following described real estate, situated in the county of King and State of Washington, to-wit: lot 8 block 11 Maynards plat of the town (now city) of Seattle, as shown on the recorded plat thereof, was offered for sale for the county and State taxes of 1891, on the 15th day of June, 1894, and no bidders appearing therefor, the same was on said day duly sold and forfeited to the county of King in the State of Washington. That thereafter on the 6th day of Feb'y 1895, H. C. Taylor of the city of Seattle, county of King, and State of Washington, applied to the county treasurer of said county and purchased the above described land and paid to such county treasurer the total amount due upon said land for which the same was sold and forfeited to the county of King as aforesaid, together with all penalties, interest and costs thereon; that thereupon a receipt therefor and certificate of purchase of said lot issued from the county of King under the hand of the treasurer of said county to said H. C. Taylor for the above described real estate and said H. C. Taylor is now the owner and holder of said receipt and certificate. That said lot was taxed in the name of C. Winchell; that said lot was taxed for the year 1891; that the time of redemption will expire on the 6" day of Feb'y 1897, after which date application will be made for a deed to said property as provided by law.

H. C. TAYLOR.

182 STATE OF WASHINGTON, } ss:
County of King, }

J. W. McConnaughey, being first duly sworn on oath deposes and says: That he is and was at all the time- herein mentioned a citizen of the State of Washington over the age of twenty-one years, that he is the agent of H. C. Taylor the person whose name is subscribed to the notice of which the within is a true copy, as owner and holder of the tax certificate therein mentioned. That on the 5th day of November 1896, he served said notice on L. Gemechi the person in actual possession and occupancy of the lot in said notice described to whom said notice is addressed by delivering to him the original notice and making the contents thereof known to him at —— in the county of King — in the State of Washington. Such service being caused to be made by the person who purchased and is the owner and holder of such tax certificate.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11 day of Feb'y 1897.
[NOTARIAL SEAL.] R. S. JONES,
Notary Public in and for said State and County,
Residing at Seattle.

183 Notice.

To H. Freedman:

You, as the person in actual possession and occupancy of the lot hereinafter described, are hereby notified that the following described real estate, situated in the county of King and State of Washington, to-wit: lot 8 block 11 Maynard's plat of the town (now city) of Seattle, as shown on the recorded plat thereof, was offered for sale for the county and State taxes of 1891, on the 15th day of June, 1894, and no bidders appearing therefor, the same was on said day duly sold and forfeited to the county of King in the State of Washington. That thereafter on the 6th day of Feb'y 1895, H. C. Taylor of the city of Seattle, county of King, and State of Washington, applied to the county treasurer of said county and purchased the above described land and paid to such county treasurer the total amount due upon said land and for which the same was sold and forfeited to the county of King as aforesaid, together with all penalties, interest and costs thereon; that thereupon a receipt therefor and certificate of purchase of said lot issued from the county of King under the hand of the treasurer of said county to said H. C. Taylor for the above described real estate, and said H. C. Taylor is now the owner and holder of said receipt and certificate. That said lot was taxed in the name of C. Winchell; that said lot was taxed for the year 1891; that the time of redemption will expire on the 6″ day of Feb'y 1897, after which date application will be made for a deed to said property as provided by law.

H. C. TAYLOR.

184 STATE OF WASHINGTON, } ss:
County of King, }

J. W. McConnaughey, being first duly sworn, on oath deposes and says; that he is and was at all the time- hereinafter mentioned a citizen of the State of Washington over the age of twenty one years, that he is the agent of H. C. Taylor the person whose name is subscribed to the notice of which the within is a true copy, as owner and holder of the tax certificate therein mentioned. That on the 5th day of November 1896, he served said notice on H. Freedman the person in actual possession and occupancy of the lot in said notice described to whom said notice is addressed by delivering to him the original notice and making the contents thereof known to him at —— in the county of King — in the State of Washington. Such service being caused to be made by the person who purchased and is the owner and holder of such tax certificate.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11 day of Feb'y, 1897.
[NOTARIAL SEAL.] R. S. JONES,
Notary Public in and for said State and
County, Residing at Seattle.

185 Notice.

To Oscar Knox:

You, as the person in actual possession and occupancy of the lot hereinafter described, are hereby notified that the following described real estate, situated in the county of King and State of Washington, to wit: lot 8 block 11 Maynard's plat of the town (now city) of Seattle, as shown on the recorded plat thereof, was offered for sale for the county and State taxes of 1891, on the 15th day of June, 1894, and no bidders appearing therefor, the same was on said day duly sold and forfeited to the county of King, in the State of Washington. That thereafter on the 6th day of Feb'y 1895, H. C. Taylor of the city of Seattle, county of King, and State of Washington, applied to the county treasurer of said county of King and purchased the above described land and paid to such county treasurer the total amount due upon said land and for which the same was sold and forfeited to the county of King as aforesaid, together with all penalties, interest and costs thereon; that thereupon a receipt therefor and certificate of purchase of said lot issued from the county of King under the hand of the treasurer of said county to said H. C. Taylor for the above described real estate and said H. C. Taylor is now the owner and holder of said receipt and certificate. That said lot was taxed in the name of C. Winchell; that said lot was taxed for the year 1891; that the time of redemption will expire on the 6th day of Feb'y 1897, after which date application will be made for a deed to said property as provided by law.

H. C. TAYLOR.

186 STATE OF WASHINGTON, } ss:
County of King, }

J. W. McConnaughey, being first duly sworn on oath deposes and says: That he is and was at all the time hereinafter mentioned a citizen of the State of Washington over the age of twenty-one years, that he is the agent of H. C. Taylor the person whose name is subscribed to the notice of which the within is a true copy, as owner and holder of the tax certificate therein mentioned, that on the 5th day of November, 1896, he served said notice on Oscar Knox the person in actual possession and occupancy of the lot in said notice described to whom said notice is addressed by delivering to him the original notice and making the contents thereof known to him at —— in the county of King — in the State of Washington. Such service being caused to be made by the person who purchased and is the owner and holder of such tax certificate.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11 day of Feb'y 1897.
R. S. JONES,
Notary Public in and for said State and
[NOTARIAL SEAL.] County, Residing at Seattle.

187 Notice.

To A. Lombardini:

You, as the person in actual possession and occupancy of the lot hereinafter described, are hereby notified that the following described real estate, situated in the county of King, and State of Washington, to-wit: lot 8 block 11 Maynard's plat of the town *of* (now city) of Seattle, as shown on the recorded plat thereof, was offered for sale for the county and State taxes of 1891, on the 15th day of June, 1894, and no bidders appearing therefor, the same was on said say duly sold and forfeited to the county of King, in the State of Washington. That thereafter on the 6th day of Feb'y, 1895, H. C. Taylor of the city of Seattle, county of King, and State of Washington, applied to the county treasurer of said county and purchased the above described land and paid to such county treasurer the total amount due upon said land and for which the same was sold and forfeited to the county of King as aforesaid, together with all penalties, interest and costs thereon; that thereupon a receipt therefor and certificate of purchase of said lot issued from the county of King under the hand of the treasurer of said county to said H. C. Taylor for the above described real estate and said H. C. Taylor is now the owner and holder of said receipt and certificate. That said lot was taxed in the name of C. Winchell; that said lot was taxed for the year 1891; that the time of redemption will expire on the 6th day of Feb'y 1897, after which date application will be made for a deed to said property as provided by law.

H. C. TAYLOR.

188 STATE OF WASHINGTON, } ss:
County of King, }

J. W. McConnaughey, being first duly sworn, on oath deposes and says: That he is and was at all the time- hereinafter mentioned a citizen of the State of Washington over the age of twenty one years, that he is the agent of H. C. Taylor the person whose name is subscribed to the notice of which the within is a true copy, as owner and holder of the tax certificate therein mentioned. That on the 5th day of November, 1896, he served said notice on A. Lombardini the person in actual possession and occupancy of the lot in said notice described to whom said notice is addressed by delivering to him the original notice and making the contents thereof known to him at —— in the county of King — in the State of Washington. Such service being caused to be made by the person who purchased and is the owner and holder of such tax certificate.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11 day of Feb'y 1897.

R. S. JONES,

[NOTARIAL SEAL.] Notary Public in and for said State and County, Residing at Seattle.

189 Notice.

To Benj. Greenberg:

You, as the person in actual possession and occupancy of the lot hereinafter described are hereby notified that the following described real estate, situated in the county of King and State of Washington, to-wit, lot 8 block 11 Maynard's plat of the town *of* (now city) of Seattle, as shown on the recorded plat thereof, was offered for sale for the county and State taxes of 1891, on the 15th day of June, 1894, and no bidders appearing therefor, the same was on said day duly sold and forfeited to the county of King, in the State of Washington, that thereafter on the 6th day of Feb'y 1895, H. C. Taylor of the city of Seattle, county of King, and State of Washington, applied to the county treasurer of said county and purchased the above described land and paid to such county treasurer the total amount due upon said land and for which the same was sold and forfeited to the county of King as aforesaid, together with all penalties, interest and costs thereon; that thereupon a receipt therefor and certificate of purchase of said lot issued from the county of King under the hand of the treasurer of said county to said H. C. Taylor for the above described real estate and said H. C. Taylor is now the owner and holder of said receipt and certificate. That said lot was taxed in the name of C. Winchell; that said lot was taxed for the year 1891, that the time of redemption will expire on the 6th day of Feb'y 1897, after which date application will be made for a deed to said property as provided by law.

H. C. TAYLOR.

190 STATE OF WASHINGTON, } ss:
County of King, }

J. W. McConnaughey, being first duly sworn, on oath deposes and says: That he is and was at all the time hereinafter mentioned a citizen of the State of Washington over the age of twenty-one years, that he is the agent of H. C. Taylor the person whose name is subscribed to the notice of which the within is a true copy, as owner and holder of the tax certificate therein mentioned. That on the 5th day of November, 1896, he served said notice on Benj. Greenberg the person in actual possession and occupancy of the lot in said notice described to whom said notice is addressed by delivering to him the original notice and making the contents thereof known to him at —— in the county of King — in the State of Washington. Such service being caused to be made by the person who purchased and is the owner and holder of such tax certificate.

J. W. McCONNAUGHEY.

Subscribed and sworn to before me this 11 day of Feb'y 1897.

R. S. JONES,
Notary Public in and for said State
[NOTARIAL SEAL.] and County, Residing at Seattle.

191 Volume 50 of Deeds, Page 67.

Fred E. Sander and Wife *et al.* to Henry S. Woodward. } #18926. Warranty Deed.

This indenture made this twenty eighth day of April in the year of our Lord one thousand eight hundred and eighty eight,

Between Fred E. Sander, Nellie B. Sander, J. W. George and Cassandra E. George, all of King county, Washington Territory, the parties of the first part and Henry S. Woodward of the same place the party of the second part.

Witnesseth. That the said parties of the first part for and in consideration of the sum of twenty thousand dollars gold coin of the United States to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, the following described tract or parcel of land situate, lying and being in the county of King, Territory of Washington, and particularly bounded and described as follows, to-wit:

All of lot eight (8) in block eleven (11) of Maynard's plat of the town now city of Seattle.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold the said premises, with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

And the said parties of the first part do hereby covenant to and with the said party of the second part, his heirs and assigns, that they are the owners in fee simple of said premises, that they are free from all incumbrances excepting a mortgage for seven thousand dollars executed by J. W. George & Cassandra E. George, Oct.
192 29th, 1886, payable in three years to Theophilus Brown, which the grantee herein assumes and agrees to pay and that they will warrant and defend the same from all claims whatsoever excepting as to the above mentioned mortgage and city and county taxes for the year 1888.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

FRED E. SANDER. [SEAL.]
NELLIE B. SANDER. [SEAL.]
J. W. GEORGE. [SEAL.]
CASSANDRA E. GEORGE. [SEAL.]

Signed, sealed and delivered in the presence of
M. A. BRYANT.
ADDA L. GEORGE.

TERRITORY OF WASHINGTON, } ss:
County of King, }

On this 28th day of April, A. D. 1888, before me, a notary public in and for King county, Washington Territory, personally came Fred E. Sander, Nellie B. Sander, J. W. George and Cassandra E. George to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

And the said Nellie B. Sander wife of said Fred E. Sander and Cassandra E. George wife of said J. W. George each for herself upon an examination by me, separate and apart from her said husband, when the contents of said instrument were by me fully make known into her and she was by me fully apprised of her rights and the effect of signing the within instrument, did, separate and apart from her said husband, sign and acknowledged the same, acknowledging that she did voluntarily of her own free will and without fear of or coercion from her said husband execute the within instrument.

Witness my hand and official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] T. R. PUMPHREY,
Notary Public in and for King County,
Washington Territory.

193 Filed for record at the request of H. S. Woodward April 30th A. D. 1888 at 35 min. past 2 o'clock p. m.

LYMAN WOOD,
County Auditor.

STATE OF WASHINGTON, } ss:
County of King, }

I, Geo. B. Lamping, auditor of King county, State of Washington, and *ex-officio* recorder of deeds in and for said county, do hereby certify the above and foregoing to be a true and correct copy of a W. D. — Fred E. Sander *et ux et al.* to Henry S. Woodward as recorded in this office in vol. 50 of Deeds page 67 Records of King county.

Witness my hand and official seal this 2nd day of June 1902.
[SEAL.] GEO. B. LAMPING,
Auditor of King County, Washington,
By H. E. TAYLOR, Deputy.

No. 2720.

194 SARAH WOODWARD and JOHN H. McGRAW, as Administrator with the Will Annexed of the Estate of Henry S. Woodward, Deceased, Appellants,
v.
H. C. TAYLOR ET AL., Respondents.
No. 4429. Filed Sept. 19, 1903.

This action is to quiet title to certain real estate. Several causes of action are alleged in the complaint. Each cause is to set aside a separate deed to the property in question. It is necessary to notice only the first cause alleged. For some time prior to the year 1891 Sarah Woodward was a non-resident of the State of Washington, and is still such non-resident. She was the owner of lot 8 in block 11, Maynard's plat to the city of Seattle. This property was assessed for general, State and county taxes for the year 1891 in the name of C. Winehill. It does not appear that the taxing officers knew when the assessment was made that the property belonged to Mrs. Woodward. Subsequently the taxes for that year became delinquent and the property was sold in 1894, under the provisions of the revenue act of 1893. The county of King became the purchaser. Subsequently the county transferred the certificate of sale to the respondents, who thereafter obtained a tax deed. At the trial of the cause the lower court held that this tax deed conveyed a valid title, and dismissed the action. The points relied upon by appellant to secure a reversal are that the property was not assessed in the name of the owner, and no notice of the sale or of the expiration of the time of redemption or of the application for a deed was given to the owner, and that therefore the respondents acquired no title to the land by virtue of the sale and tax deed.

In Baer v. Choir, 7 Wash. 631, this court held that under the revenue law of 1871 the assessment of unoccupied land to one
195 not its owner was unauthorized and void. In Vestal v. Morris, 11 Wash. 451, this court held that under the law in force in 1886 the failure to assess real property in the name of a known owner was a substantial failure to comply with the law, and that the assessment was void. At the time of the assessment in each of the foregoing cases, the law then in force was substantially as found in the Code of 1881, § 2832 of which provides:

"The assessor shall set down in an assessment roll, to be prepared by himself, in separate columns and according to the best information he can obtain: (1) The names alphabetically arranged of all persons subject to taxation in his county, and numbers of the road and school districts of which each person assessed is a resident. (2)

A description of each tract or parcel of land to be taxed, specifying under separate heads the township, range, and section, and the number of the school and road district in which the land lies, or if divided into lots and blocks, then the number of the lot and block. (3) The number of acres and parts of an acre, as near as the same can be ascertained, unless the land be divided into lots and blocks. (4) The number of acres and parts of acres in each parcel of land except town or city lots, that are improved or cultivated. (5) The full cash value of the improvements upon each lot or parcel of land assessed (6) The full cash value of each lot or parcel of land assessed. (7) The full cash value of all the taxable personal property owned by or to be taxed against such persons, as provided by law. (8) The total valuation of all property assessed, real and personal. (9) The amount of road poll tax of each person or firm liable for the same. (10) The amount of poll tax of each person or firm liable for the same."

§ 2836. "If the owner or claimant of any property, not listed by another person, is absent or unknown, the assessor must list and make an estimate of the value of such property."

§ 2837. "If the name of the absent owner is known to the assessor, the property must be assessed in his name; if unknown the property must be assessed to 'unknown owners.'"

After delinquency taxes were collected by distraint and sale of personal property belonging to the person assessed.

In the year 1890 the legislature passed an independent revenue law for the assessment and collection of taxes and repealed all prior laws. Laws 1889–90 p. 530. By § 49 of this act, page 548, it was provided:

"The assessor shall make out, in the real property assessment book, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known, so stated opposite each tract or lot, the number of acres, and the lots or parts of lots, or blocks, included in each description of property, * * * ."

For the assessment of personal property the assessor was required by § 53 to make an alphabetical list of the names of the persons
196 in his county liable to assessment of personal property and to require each person to make a correct statement of such property. This act provided for the levy of the taxes for State and other purposes, and that, when such taxes should become delinquent, if not paid, at a certain time after delinquency the county auditor should file in the office of the clerk of the superior court of the county a list of the delinquent taxes upon real estate within his county, "which list shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent, with the name of the owner, if known, and if unknown, so stated, appearing on the delinquent list, and the amount of tax delinquent and penalty for each year opposite such description, and shall verify such list by his affidavit that the same is a correct list of the taxes delinquent for the year or years therein appearing, upon real estate in said county. The filing of such list shall have the force and effect of filing a com-

plaint in an action by the county against each piece or parcel of land therein described, to enforce payment of the taxes and penalties therein appearing against it, and shall be deemed the institution of such action" (§ 100, p. 566.) The act then provides that the clerk of the court shall publish a notice directed "to all persons, companies or corporations who have or claim to have any estate, right, title or interest in, claim to, or lien upon any of the several pieces or parcels of land in the list hereto attached, requiring *them to appear* and set forth any objection or defenses to the taxes, and after publication of the notice that the superior court should be deemed to have acquired jurisdiction to enforce against the land the taxes, penalties and costs by a proper judgment to that effect. It also provided for trial in case of any appearance, and that no omission of the assessing or levying officer shall be a defense to the taxes unless the land shall have been partially, unfairly or unequally assessed, or that the taxes have been paid or the land exempt from taxation. It provided further that the judgment should be final except as to persons who had appeared in the action. It will be readily observed that
197 this act, in so far as it affected real estate, was an assessment *in rem*, and the taxes were enforced against the land and not against the person, as was the law prior to the act of 1890.

In the year 1893 the legislature passed another independent revenue act for the assessment and collection of taxes, and repealed all former acts. The general plan of this act, as to the assessment and collection of taxes, was the same as that of the act of 1890. Section 45 of the act of 1893, p. 341, is as follows:

"The assessor shall list all real property according to the smallest legal subdivision as near as practicable, and, where land has been platted into lots and blocks, he shall list each lot or fraction thereof separately. The assessor shall make out in the real property assessment books, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of the owners if to him known, and if unknown, so stated opposite each tract or lot in pencil memorandum, the number of acres and lots or parts of lots, included in each description of property * * *."

Section 48 provides for an alphabetical list of individuals liable to assessment for personal property, as was provided in § 53 of the act of 1890. The manner of enforcing the collection of delinquent taxes on real estate under the act of 1893 was substantially the same as under the act of 1890. In the year 1895 several sections of the act of 1893 were amended. Section 45 was amended to read as follows:

"The assessor shall list all real property according to the smallest legal subdivision, as near as practicable, and where land has been platted into lots and blocks, he shall list each lot or fraction thereof separately; provided, that when several lots in any block, or several blocks in any plat of any addition, subdivision or townsite, or several tracts of land shall be owned by any one person, firm, syndicate, or corporation, the assessor may group such lots or blocks

and tracts so far as practicable. The assessor shall make out in the real property assessment book, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of owners, if to him known, and, if unknown, so stated opposite each tract or lot in pencil memorandum, the number of acres and lots or parts of lots included in each description of property * * *."

It will thus be seen that there has been no material change since *the act of 1890 in the* manner of listing, assessing or collecting taxes on real property in this State. The essential provision for listing and assessing real estate has been maintained in the acts of 1893 and 1895 substantially as it was in 1890, viz., "the assessor shall make out, in the real property assessment book, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known, and if unknown so stated opposite each tract or lot in pencil memorandum, the number of acres and lots or parts of lots included in each description of property."

198

In the case of Coolidge v. Pierce County, 28 Wash. 95, this court held that the omission of the name of the owner and of the entry of unknown owner, under the curative provisions of the act of 1893 did not invalidate an assessment for the year 1897 and previous years. It was there said:

"In the tax levied in 1897 upon realty belonging to plaintiff, under the law of 1895 (Laws 1895, pp. 511, 512; §§ 3, 4,) the tax is charged upon the land and the proceedings are *in rem*. It was therefore competent for the legislature to provide, as it did, that the land should be assessed by suitable description, in numerical order, at a certain time, and the assessment roll made up and filed at a certain time, and such proceedings may be due notice to the owner of such realty of the tax charged."

But it was also said in that case:

"Counsel for plaintiff urges that the failure to enter the name of the owner or of unknown owners after the description of the realty is a substantial defect, and to the injury of the plaintiff. This was true under the revenue law prior to the enactment of the statute of 1895. Under the prior system, real property was assessed to the owner. The owner's name was an essential part of the description. It was in fact a material part of the notice given to him of the tax charged against his real property, and was so adjudged by this court. Baer v. Choir, 7 Wash. 631; Vestal v. Morris, 11 Wash. 451. And see Railroad Co. v. Galvin, 85 Fed. 811."

It is argued by appellants that this language is decisive of this case and that it is in effect a decision of this court that prior to the act of 1895 the name of the owner was a necessary requisite to a valid assessment. At that time we were not considering the effect of any act prior to the act of 1895, and the court assumed without an examination that the prior acts were substantially the same as when the decisions cited were rendered. It was not necessary in that case to decide what the effect of other acts was. As we have seen above,

there was no material difference, in the manner of listing, assessing and collecting taxes upon real estate, between the act of 1890 and that of 1895. If the assessment and proceedings to collect taxes were *in rem* in 1895, as was held in Coolidge v. Pierce County, they were also *in rem* in 1890. The cases of Baer v. Choir and Vestal v. Morris were based upon the laws providing for assessment of real property
199 to the owner and collection by distraint of personal property. *Since the act of 1895 provided for assessment and collection in rem* those cases could have no application to the act of 1895, and this was the distinction which the court made. The United States circuit court, in Railroad Co. v. Galvin, 85 Fed. 811, held that under the statute in force in this State in 1891, which was the act of 1890, the name of the owner was necessary to a valid assessment of real estate because it was an essential part of the notice of the initiation of proceedings to create a tax lien. The learned judge in that case assumed that the assessment was against the person and that the name of the owner was necessary to a valid assessment by reason of the two decisions from this court above referred to. Those decisions, as we have already stated, were not based upon the act of 1890, but were based upon the law in force long prior thereto, which provided for assessments to the person of the owner. If the decision in Coolidge v. Pierce County was right—and we still think it was—in holding that the name of the owner is not necessary to a valid assessment *in rem*, then Railroad Co. v. Galvin was wrong upon that point. In Coolidge v. Pierce County we held that, "the provision for the memorandum of the name of the owner or unknown owner may be considered directory to the officer; * * * and the omission to mention the name of the owner, or to assess to an unknown owner," was not of the substance of the assessment of the property under the act of 1895. If it was not of the substance of the act of 1895 it was not of the substance of the act of 1890, and therefore its omission from the assessment of appellants' property in the year 1891 did not invalidate the assessment. The assessment being valid was itself notice to the owner of the realty of the tax charged. Coolidge v. Pierce County, *supra*. And when the notice was given as required by law to all persons having or claiming any interest in the land to appear and object to and defend against the taxes and all proceedings were regular, the court acquired jurisdiction of the *rem* and was therefore authorized to order a sale of the property.

200 Cooley on Taxation, p. 527;
Black on Tax Titles, §§ 168, 170.

It is next urged that there was no notice to the owners of the expiration of the period of redemption and of the application for a deed. This point is based largely upon the point already considered. It is shown by the record that notice as required by law was given to all the tenants and occupants of the property and the person in whose name it was assessed, that the owner, Mrs. Wood-

ward, was a non-resident of the State, and that a notice was given to her agent in Seattle, and was also published. This was all that was required by § 127 of the Laws of 1893, p. 380. Holding as we do upon the points above discussed, it is unnecessary to refer to or discuss other errors alleged in the briefs.

The judgment of the lower court is therefore affirmed.

MOUNT, J.

We concur:

FULLERTON, C. J.
ANDERS, J.
DUNBAR, J.

201 SARAH WOODWARD, ETC., Appellant, v. H. C. TAYLOR ET AL., Respondents. } No. 4429. On petition for Rehearing.

FEB. 29TH, 1904.

Per Curiam:

On petition for rehearing our attention is called to the fact that nothing was said in the opinion about the act of 1891, Laws of 1891, p. 280, and it is now insisted that the act of 1890 never became operative for the following reasons: Because it became a law on March 28, 1890, without the approval of the governor; it contained no emergency clause and therefore did not become effective until June 28, 1890; by its terms the assessment books were to be delivered to the assessor on the last Saturday in March and that officer was to begin his duties in April, which was two months prior to the time the act became effective; on March 9th, 1891, another revenue act was passed which became effective at once. It is insisted that the act of 1891 repealed and superseded the act of 1890, that the latter act never became operative, that the assessment for the year 1891 was therefore made under the act of 1891, and that, under § 45 thereof, the system of numerical assessment or assessments *in rem* did not apply for that year. This theory of the case was not presented to the court below and was not mentioned in the arguments or briefs on the appeal, but the case was presented both in the lower court and in this court upon the theory that the assessment was made under the act of 1890, as in fact it was, and the act of 1891 was for that reason not mentioned.

If the act of 1890 was superseded by the act of 1891 as stated, there would be much force in appellant's position, but in the repealing clause of the act of 1891 it was expressly provided:

That the repeal of said act (1889–90) shall not be construed to impair any existing right, or affect any proceeding pending at the time this act shall take effect; but all proceedings for the assessment of any tax or collection of any tax, or special assessment remaining incomplete, may be completed under the provisions of the above entitled act hereby repealed."

Proceedings for the assessment in King county were begun
202 in 1891, under the act of 1890, before the passage of the act of 1891. These proceedings were completed under the saving provision above set out. It follows, therefore, that the provisions of the act of 1891 did not affect the validity or method of the assessment under the act of 1890.

Other questions presented in the petition for rehearing do not require further discussion. We are satisfied with the conclusion reached in the original opinion. The petition for rehearing is therefore denied.

202½ In the Supreme Court of the State of Washington.

TUESDAY, May 3, 1904.

SARAH WOODWARD ET AL., Appellants,
vs.
H. C. TAYLOR ET AL., Respondents.
} No. 4429. Order.

Ordered that Henry French be and he is hereby substituted for and in the place of Sarah Woodward and John H. McGraw, as administrator with the will annexed of the estate of Henry S. Woodward, deceased, as appellant in this action.

203 In the Supreme Court of the State of Washington.

WEDNESDAY, May 4, 1904.

SARAH WOODWARD ET AL., — HENRY French, Substituted, Appellant,
vs.
H. C. TAYLOR ET AL., Respondents.
} No. 4429. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of King county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now on this 4th day of May, A. D. 1904, on motion of Richard Saxe Jones Esquire counsel for the respondent, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, the petition for rehearing denied, and that the said H. C. Taylor *et al.*, have and recover of and from the said Henry French and from United States Fidelity & Guaranty Company, sureties, the costs of this action taxed and allowed at fifty-nine & 04/100 dollars and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

204 In the Supreme Court of the State of Washington.

HENRY FRENCH (Substituted in Place of Sarah Woodward and John H. McGraw as Administrator of the Estate of Henry S. Woodward, Deceased), Plaintiff in Error,
v.
H. C. TAYLOR and LIDA R. TAYLOR, His Wife, and J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants in Error.

No. —. Petition for Writ of Error.

To the Hon. Mark A. Fullerton, chief justice of the supreme court of the State of Washington:

Comes now Henry French, the above named plaintiff in error, by his attorney, T. O. Abbott, Esq., and complains and alleges as follows, to-wit:

I.

That he is a citizen and resident of the State of California, having his place of residence at the city of San Jose, in the county of Santa Clara, in said State.

II.

That heretofore, to-wit: on the 3rd day of May, 1904, by an order of the above entitled court duly made and entered herein, the said Henry French was substituted as the plaintiff and appellant in this action in place of Sarah Woodward and John H. McGraw as administrator with the will annexed, of the estate of Henry S. Woodward, deceased; the said Henry French having succeeded to all of the right, title and interest of the said Sarah Woodward and the said John H. McGraw, as said administrator, in and to the cause of action set forth in the second amended complaint, and also to all of the rights and privileged which might or should have accrued to the said Sarah Woodward and the said John H. McGraw, as said administrator, by virtue of any of the proceedings had and done in this action.

III.

That by an order made herein on the 4th day of May, 1904, final judgment was rendered against your petitioner by the su-
205 preme court of the State of Washington (that being the highest court of law or equity in the State of Washington) wherein it was adjudged as follows, to-wit: That the judgment of the superior court of the State of Washington in and for the county of King, entered on the 3rd day of June, 1902, dismissing this action and rendering judgment against the said Sarah Woodward and the said John H. McGraw, as said administrator, should be and was thereby

affirmed, and whereby costs were adjudged and taxed against the said Sarah Woodward and the said John H. McGraw, as said administrator-, in the sum of fifty-nine & 04/100 dollars.

IV.

That the plaintiff in error (and his predecessors) has, in all the proceedings in this action, specially set up and claimed the rights, title and privileges guaranteed by section one of article fourteen of the amendments to the Constitution of the United States, and the decision of the said supreme court in the order and judgment aforesaid, was against the validity of the said claim—all of which more fully appears from the assignment of errors which is filed with this petition.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Washington and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected, and said judgment reversed, and your petitioner granted the relief to which he is entitled as appears by the records and proceedings herein. And your petitioner will ever pray.

HENRY FRENCH, Petitioner,
By T. O. ABBOTT, His Attorney.

STATE OF WASHINGTON, } ss:
County of King, }

I, T. O. Abbott, being first duly sworn, do, on oath depose and say: That I am the attorney for the above named petitioner in the above entitled matter, and that I have read the foregoing petition, know the contents thereof and believe the same to be true; 206 that the reason I make this affidavit is that the said petitioner is a non-resident of and is absent from the State of Washington.

T. O. ABBOTT.

Subscribed and sworn to before me this 8th day of June, 1904.

W. M. WILLIAMS,
[SEAL.] Notary Public in and for the State of Washington, Residing at Seattle.

The writ of error as prayed for in the foregoing petition is hereby allowed this 10th day of June, 1904. The writ of error to operate as a supersedeas, and the bond for that purpose is fixed in the sum of seven hundred and fifty dollars.

Dated at the capitol at Olympia, Washington, on this 10th day of June, 1904.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

Filed in my office this 9th day of June, 1904.

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

In the Supreme Court of the State of Washington.

HENRY FRENCH (Substituted in Place of Sarah Woodward and John H. McGraw as Administrator of the Estate of Henry S. Woodward, Deceased), Plaintiff in Error,
vs.
H. C. TAYLOR and LIDA R. TAYLOR, His Wife, and J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants in Error.

No. —. Assignment of Errors.

Comes now the above named plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the supreme court of the State of Washington in the above entitled cause there is manifest error in this, to-wit:

I.

The court erred in holding that the matters and proceedings alleged in the first cause of action of the second amended complaint
207 herein constituted due and lawful proceedings under the various acts of the legislature of the State of Washington providing for the assessment and collection of taxes on real property in said State for the year 1891, and that said proceedings were not in conflict with nor in violation of section one of article fourteen of the amendments to the Constitution of the United States, and that plaintiff in error, and his predecessors in interest, was and were not deprived of the property described in the said cause of action of said complaint without due process of law; and it particularly erred in holding that due and lawful notice of the pendency of the alleged proceedings for the taxation of said property and for the enforcement and collection of taxes for the year 1891, then in force and applicable thereto, had been given to the owners of said premises; and it particularly erred in holding that the said Sarah Woodward and the estate of Henry S. Woodward, deceased (the predecessors in interest of the plaintiff in error herein, and who were the sole and only owners of the property hereinbefore referred to at the time when a deed was claimed to be due by the defendants in error under and by virtue of the erroneous proceedings for the taxation of said premises for the year 1891) had received due and regular notice of the application for the issuance of a tax deed as provided and guaranteed by section 127 and 128 of the act of the legislature of the State of Washington approved March 15th, 1893; and it particularly erred in denying to plaintiff any relief from the cloud upon the

title of plaintiff to the premises hereinbefore referred to, created and existing by virtue of the erroneous proceedings hereinbefore referred to.

II.

The court erred in affirming the judgment of the superior court of the State of Washington for King county, entered upon the 3rd day of June, 1902, herein, and directing and ordering a judgment to be entered in said supreme court of the State of Washington, adjudging costs against the plaintiff in error herein in the sum of fifty-nine & 04/100 dollars.

T. O. ABBOTT,
Attorney for Plaintiff in Error.

Indorsed: Filed Jun- 9 1904 C. S. Reinhart, clerk.

208 In the Supreme Court of the State of Washington.

HENRY FRENCH (Substituted in Place of Sarah Woodward and John H. McGraw as Administrator of the Estate of Henry S. Woodward, Deceased), Plaintiff in Error, vs. H. C. TAYLOR and LIDA R. TAYLOR, His Wife, and J. W. McConnaughey, D. F. McConnaughey, and C. F. McConnaughey, Defendants in Error.	No. 4429. Order Allowing Writ of Error.

The above entitled matter coming on to be heard this 10 day of June, 1904, upon the petition of the above named Henry French, plaintiff in error, for a writ of error from the Supreme Court of the United States to the supreme court of the State of Washington, and upon examination of the said petition and of the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said cause, it is hereby

Ordered, that a writ of error be and the same is hereby allowed in this court from the Supreme Court of the United States.

And it is further ordered, that the bond presented by said petitioner be, and the same is hereby approved, the same to serve as a supersedeas.

MARK A. FULLERTON,
Chief Justice of the Supreme Court
of the State of Washington.

209 In the Supreme Court of the State of Washington.

HENRY FRENCH (Substituted in Place of Sarah Woodward and John H. McGraw, as Administrator of the Estate of Henry S. Woodward, Deceased), Plaintiff in Error,

vs.

H. C. TAYLOR and LIDA R. TAYLOR, His Wife, and J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, Defendants in Error.

No. —. Bond on Writ of Error.

Know all men by these presents: that we, Samuel L. Crawford and Charles T. Conover, for and on behalf of Henry French, the above named plaintiff in error, do undertake and promise to pay unto H. C. Taylor and Lida R. Taylor, his wife, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, the defendants in error above named, the sum of seven hundred and fifty (750) dollars, the payment of which said sum well and truly to be made we are held and firmly bound and do hereby bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 11th day of June, 1904.

The condition of this obligation is such, that whereas, the above named Henry French, plaintiff in error, has been granted a writ of error to the Supreme Court of the United States, which he seeks to prosecute to reverse the judgment rendered in the above entitled action by the supreme court of the State of Washington, on the fourth day of May, 1904, and whereas the said judgment awarded costs in favor of said defendants in the sum of 59 & 04/100 dollars;

Now therefore, if the said Henry French, plaintiff in error, shall prosecute the said writ of error to effect, and shall answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise — be and remain in full force and effect.

SAMUEL CRAWFORD. [SEAL.]
CHARLES T. CONOVER. [SEAL.]

UNITED STATES OF AMERICA,
State of Washington, County of King, } ss:

Samuel L. Crawford and Charles T. Conover, being first
210 duly sworn, each for himself and not one for the other, deposes and says: that he is a citizen of the United States and of the State of Washington; that he is one of the parties whose name is attached to the foregoing instrument; and that he is worth the sum of fifteen hundred (1500) dollars over and above all his debts and liabilities exclusive of property exempt from execution.

SAMUEL L. CRAWFORD.
CHARLES T. CONOVER.

Subscribed and sworn to before me this 11th day of June, 1904.

W. B. BROOKS,
[SEAL.] Notary Public in and for the State of Washington, Residing at Seattle.

The above bond is hereby approved.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Filed Jun- 10 1904. C. S. Reinhart, clerk.

211 UNITED STATES OF AMERICA, ss:

The President of the United States to the supreme court of the State of Washington:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of the State of Washington, before you at the January term, 1904, thereof, between Henry French, (substituted in place of Sarah Woodward and John H. McGraw, as administrator of the estate of Henry S. Woodward, deceased) vs. H. C. Taylor and Lida R. Taylor, his wife and J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey, defendants, a manifest errir has happened to the great damage of said plaintiff in error, Henry French, as by his complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of clerk of the United States Supreme Court, on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid, being inspected, the United States Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of June 1904.

Done in the city of Tacoma, with the seal of the circuit court of the United States, for the district of Washington, attached.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYERS,
Clerk Circuit Court United States,
District of Washington.

Allowed.

_____,
Chief Justice of the Supreme Court of the State of Washington.

212 [Endorsed:] 4429 Henry French pl'ff in error vs. H. C. Taylor, *et al.*, def'ts in error. Writ of error. Filed Jun- 10, 1904 C. S. Reinhart clerk.

213 UNITED STATES OF AMERICA, ss:

The President of the United States to H. C. Taylor and Lida R. Taylor, his wife, J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein Henry French, (substituted in place of Sarah Woodward and John H. McGraw, as administrator of the estate of Henry S. Woodward, deceased), is plaintiff in error, and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the chief justice of the supreme court of the State of Washington, this 13th day of June, 1904.

[Seal of the Supreme Court, State of Washington.]

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the
State of Washington.

Attest: C. S. REINHART,
Clerk of the Supreme Court of
the State of Washington.

STATE OF WASHINGTON, } ss:
County of King, }

I, the undersigned, do hereby acknowledge receipt of original of the above citation, receipt of original by H. C. Taylor and Lida R. Taylor, his wife, J. W. McConnaughey, D. F. McConnaughey and C. K. McConnaughey for whom I am acting as attorney.

Dated, Seattle, King Co., Washington, June 14th, 1904.

R. S. JONES,
Attorney for said Parties Cited.

[Endorsed:] 4429. Filed Jun- 16, 1904. C. S. Reinhart, clerk.

214 In the Supreme Court of the State of Washington.

HENRY FRENCH (Substituted in Place of Sarah Woodward and John H. McGraw, as Administrator of the Estate of Henry S. Woodward, Deceased), Plaintiff in Error,
v.
H. C. TAYLOR and LIDA R. TAYLOR, His Wife, and J. W. McConnaughey, D. F. McConnaughey, and C. K. McConnaughey, Defendants in Error.

No. 4429. Clerk's Certificate.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the above entitled cause as I have been directed by the plaintiff in error to transmit to the Supreme Court of the United States. And, that, in pursuance of the writ of error heretofore filed in this cause, I now transmit said record, together with the original writ of error and the original citation, to said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court at Olympia, this 22d day of June, 1904.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, Clerk.

Costs of Suit.

Plaintiff's costs — dollars, paid by T. O. Abbott, attorney for plaintiff in error.

Defendant's costs — dollars, paid by Richard Saxe Jones, attorney for defendants in error.

Cost of transcript fifty-three dollars, paid by T. O. Abbott, attorney for plaintiff in error.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the
State of Washington.

Endorsed on cover: File No. 19,409. Washington supreme court. Term No. 57. Henry French (substituted in place of Sarah Woodward & Jno. H. McGraw, as administrator of the estate of Henry S. Woodward, dec'd), plaintiff in error, vs. H. C. Taylor and Lida R. Taylor, his wife, *et al.* Filed July 5", 1904. File No. 19,409.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 7 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States of America

HENRY FRENCH,
Plaintiff in Error,
vs.
H. C. TAYLOR and LIDA R. TAYLOR, his wife, J. W. McCONNAUGHEY, D. F. McCONNAUGHEY and C. K. McCONNAUGHEY,
Defendants in Error.

Dec. 5

Answer of Plaintiff in Error to Motion to Dismiss.

T. O. ABBOTT,
Attorney for Plaintiff in Error.

ALLEN & LAMBORN PRINTING CO., TACOMA, WASH.

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HENRY FRENCH,
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vs.

H. C. TAYLOR and LIDA R. TAYLOR, his wife, J. W. McCONNAUGHEY, D. F. McCONNAUGHEY and C. K. McCONNAUGHEY,
Defendants in Error.

ANSWER OF PLAINTIFF IN ERROR TO MOTION TO DISMISS.

THE PRINTING OF THE RECORD.

Counsel offer an apology to this court because of their inability to refer to the pages of the record, the same not having been printed. The rule, as we understand it to be, is that the record upon motions to dismiss and affirm must be printed by the moving party,—at least we are so advised by the clerk of this court. As no such record has been as yet supplied, we are also unable to refer to the pages in the transcript.

STATEMENT OF THE CASE.

The statement of the record in this case, as given by the defendants in their motion to dismiss, is not in all respects correct; nor is it as full as seems to us necessary for a proper understanding of the merits of this action.

I.

The plaintiff in error, Henry French, was substituted *before* final judgment, and not afterwards, as stated by defendants in error at the top of page 5 of their brief.

See Order of Substitution, Transcript, p. —

II.

The first cause of action stated in the complaint, (so far as the jurisdiction of this court is concerned) is founded upon the *want of notice* to the owner of the property at the time when it was assessed, and also when the application was made for a tax deed.

See Transcript, p. —

III.

The second cause of action stated in the complaint has for its object the rescission of a quit-claim deed given by Sarah Woodward and the *administrator of the estate of Henry S. Woodward, deceased*, (not by Sarah Woodward alone, as stated in the motion). The grounds of the action to set aside this deed, are not, as stated by the defendants, simply "that the plaintiff was "an elderly woman and claimed that she had made the deed un- "der a misapprehension of the facts;" but are much broader, and may be thus briefly stated:

1. The consideration for the deed was so grossly inadequate as to shock the conscience—the property being worth more than $40,000 at the time, and the *agreed* consideration being $1500.

2. The *agreed* consideration was never paid—only $350 of the $1500 being paid.

3. Sarah Woodward, who executed the deed for herself and as administrator of the estate, was a non-resident of the state, and knew nothing of the value of the property except as she was informed by others—and it was represented to her that $1500 was the full value of her interest.

4. The property was sold for taxes assessed against it *without notice* to the owners, and at the time when the quit-claim deed was executed it was represented to Mrs. Woodward that she held nothing but the *nominal* title, whereas in fact she and the estate were the owners of the *real* title;—and therefore the conveyance was made under a mistake of fact, from which plaintiff claims relief under the rule laid down by Pomeroy in his Equity Jurisprudence, Sec. 849. "Wherever a person is *ignor-* "*ant* or *mistaken* with respect to his own antecedant existing

"*private legal* rights, *interests, estates,* duties, liabilities or other "relation, either of *property,* or *contract,* or personal status, and "enters into some transaction the *legal* scope and operation of "which, he correctly apprehends and understands, for the pur-"pose of affecting such *assumed* rights, interests, or relations, or "of carrying out such assumed duties, or liabilities, equity will "grant its relief, defensive or affirmative, treating the mistake "as analagous to, if not identical with, a mistake of fact."

5. Mrs. Woodward was 77 years of age at the time when the quit-claim deed was executed, infirm, and in necessitous circumstances, which entitles her to relief under the rule announced by Pomeroy at Sec. 928 of his Equity Jurisprudence as follows: "When the accompanying incidents are inequitable and show "bad faith, such as concealments, misrepresentations, undue ad-"vantage, oppression on the part of the one who obtains the "benefit, or ignorance, weakness of mind, sickness, old age, in-"capacity, pecuniary necessities, and the like, on the part of the "other, these circumstances, combined with inadequacy of price "may easily induce a court to grant relief, defensive or affirma-"tive."

IV.

The third cause of action is to enforce a resulting or constructive trust, for the benefit of the plaintiff in error.

V.

The fourth cause of action seeks to set aside the quit-claim deed referred to in the second cause, upon objections to its *legal* sufficiency.

VI.

The fifth cause of action seeks to secure an accounting of the rents and profits.

CAUSE OF ACTION IN ISSUE HERE.

The first cause of action, which relates to the tax proceedings, is the only cause necessary to be considered by this court in passing upon this motion. It is conceded by the plaintiff in error, that if these proceedings constitute due process of law, then this court has no jurisdiction, and the motion of the defendants is properly taken.

A further statement of the grounds of this cause of action and the evidence in the record will be given as the consideration of the points made by the defendants for the dismissal and affirmance, proceeds. It should always be borne in mind, however, that the basis of this want of due process, is the entire absence of *notice* to the owners.

ANSWER TO ARGUMENT OF DEFENDANTS.

POINT I.

Defendants contend that the plaintiff has not raised "any question as to the validity of a statute of or an authority exercised under any state," because, (to use their own language) "Nowhere is there a suggestion that the statutes of the state of "Washington for 1889, 1890, 1891, or of 1893, are of themselves "in conflict with the Constitution of the United States, but sim- "ply set forth that certain things which had been done by taxing "officers of the county of King, and by the defendants in error "were violations of the Constitution."

This point is sufficiently answered by this court, because it has several times held that it is not necessary, in order to invoke its jurisdiction, to show that the provisions of the statute itself are insufficient to constitute due process of law, but that a decision of the highest court of the state may as effectually deprive a citizen of the protection of the 14th amendment as may an act of the legislature. See

Scott vs. McNeal, 154 U. S., 34.
Chicago Burlington & Quincy vs. Chicago, 166 U. S., 226.

In Scott vs. McNeal, the state court held that where a man had been continually absent from his home and unheard of for seven years, the presumption was raised that he was dead and that in such case the Probate Court had jurisdiction to issue letters of administration on his estate, and that a purchaser of his property at administrator's sale acquired a perfect title as against the supposed decedent. There was no statute of the state that declared that a person absent or unheard of for seven years was deemed to be dead nor was there any statute providing for the administration of the estate of such a person. Neither

did the court justify its decision as being in accordance with any statute. The whole fabric was raised on the disputable presumption, a *mere rule of evidence*, that a person absent and unheard of for seven years was presumed to be dead. In the state court the records of the Probate Court were offered to prove title in the purchaser at the administrator's sale, but were objected to "upon the ground that they were absolutely void, because no ad-"ministration on the estate of a deceased person could be valid, "and the Probate Court had no jurisdiction to make the orders "in question," and it was held "that to give effect to the Probate "proceedings under the circumstances would be to deprive him of his property without due process of law." And it was said by this court that the constitutional "prohibitions extend to all acts of the state whether through its legislative, its executive, or "its *judicial* authorities."

In the Chicago, Burlington & Quincy case, above cited, it was said: "In our opinion a judgment of a state court, even if "it be authorized by statute, whereby private property is taken "for the state or under its direction for public use, without com-"pensation made or secured to the owner, is, upon principle and "authority, wanting in the due process of law required by the "fourteenth amendment of the constitution of the United States, "and the affirmance of such judgment by the highest court of "the state is a denial by that state of a right secured to the own-"er by that instrument."

The authorities cited by the defendants relate to the impairment of contract obligations by certain legislative acts and have no application to the case at bar.

The particular facts, as shown by the record, upon which plaintiff relies to show *want of notice*, and, therefore, the want of due process, will be specifically set out below upon the argument of the motion to affirm.

POINT II.

Defendants contend that the federal question is not properly raised. This contention seems to be based upon the theory that (as they allege) the *claim* of the protection of the 14th amendment is made only in the complaint.

After setting out the various proceedings as shown by the record concerning the tax title, which plaintiff claims to have been void, he makes the following averment: "That all the "proceedings in this paragraph enumerated, was and were in "violation of article five and the first section of article fourteen "of the amendments to the constitution of the United States, and "of section three of article one of the constitution of the state "of Washington in this, that it constitutes an attempt to deprive "plaintiffs of their property without due process of law."

This averment was *denied* by the answer. This averment and the denial put the question squarely in issue between the parties.

That this showing is sufficient to require this court to take jurisdiction is directly held in—

Bellingham Bay vs. City of Whatcom, 172 U. S., 314.
Dewey vs. Des Moines, 173 U. S., 193.
Abbott vs. National Bank, 175 U. S., 409.
Williams vs. Bruffy, 102 U. S., 249.

Counsel for defendants concede that the Bellingham case is directly against their contention; but they argue that that case was not correctly decided, and that it is in conflict with other cases in this court—(not citing such cases, however.) They attempt to distinguish it from the case at bar by contending that the federal question there arose out of the statute itself and not by reason of any *violation* of the statute. But, as has already been shown upon the argument in answer to Point I, this is not the test of jurisdiction.

The Bellingham case is not only directly in point concerning the manner in which the federal question was raised, but also concerning the *issue;* that is, the real question in that case, as in the case at bar, was the *sufficiency of notice;* the only difference being that in that case the claim of insufficiency was based on the provisions of the statute (which were concededly complied with) and in this, the claim is based on the *entire want of the notice*, guaranteed by the constitution and laws.

It has been held by this court, and is undoubtedly the set-

tled rule of law, that in proceedings for taxation, *some kind* of notice is absolutely essential to constitute due process of law; that the notice may be sufficient, however, even though not personal, *if the statute so provides;* but that whatever method of notice the statute provides, must be *strictly complied with.*

This rule is so universally accepted that the citation of authorities would seem to be a useless waste of space and time. (See infra the argument upon the motion to affirm). So that, even if it were true (which it is not), that the federal claim was never made except in the complaint, the fact that it was so made would be sufficient to require this court to take jurisdiction of this proceeding.

Undoubtedly, therefore, it is wholly immaterial whether the following statement of counsel for defendant is correct or not: "Nowhere in the record and never at any time, either in oral "argument, written argument, brief, assignment of error, or "otherwise, was this question ever suggested until the writ of "error was sued out to this court."

Perhaps we should apologize to this court for attempting to reply to this statement, as it is entirely outside the record; but it is due to this court that attention should be called to the affidavit of the attorney for the plaintiff in error, and the exhibit thereto atached, which is in the record. It there appears that the federal question was specially called to the attention of the state court, both in oral and written argument. If counsel for defendants should see fit, as indeed they may, to controvert the statements of the affidavit concerning the *oral* argument of this question, they cannot controvert the record as presented by the exhibit which shows that their statement is certainly incorrect in saying that the attention of the court was not called to this question in the *written argument* and briefs. By referring to page 22 of the printed motion for rehearing (which is certified as an exhibit and attached to the affidavit) the following language appears:

"The term 'proceeding in rem,' as applied to taxation, has "never, under any statute, so far as we are aware, been held to "mean a proceeding strictly against the thing as in admiralty

"proceedings; that is, that mere possession of the thing is notice "to all the world, and that the owner of the property is bound "whether the statutory requirements have been observed or not. "Notice of some kind, is just as essential to a valid judgment in "a proceeding in rem as in any other proceeding.

"But the real question in the case at bar is not whether the "proceeding is *in rem* or is *in personam;* it is whether due process "of law has been observed as guaranteed by Sec. 7 of Art. 1 of "the Constitution of the State of Washington, and by Sec. 1 of "Art. 14 of the amendments to the Constitution of the United "States. We do not contend here that the act itself is not suffi- "cient to give 'due process,' but we do insist that the manner of "observance of that act is want of due process. The first element "of 'due process' is notice. We do not contend that personal "notice is necessary. But whatever the prescribed method of "giving it may be, that method must be strictly complied with."

It is perfectly apparent that counsel for defendants have not closely examined the record, nor followed the argument in this case, and we think it does not require further argument to show to this court that the federal claim was made and presented at all reasonable and proper stages of this proceeding.

Concerning the further argument advanced by counsel for defendants in support of this point, namely, "that the decision "of the state court in this cause was clearly based upon matters "exclusive of any federal question," we call attention to the following language in the decision itself: "The points relied upon "by appellants to secure a reversal are that the property was not "assessed in the name of the owner, that no notice of the sale, or "of the expiration of the time of redemption or of the applica- "tion for a deed, was given to the owner, and that, therefore, the "respondents acquired no title to the land by virtue of the sale "and tax deed."

See Transcript p. —

From the foregoing extract it will be observed that the only question passed upon by the Supreme Court of this state was, as we have contended, the *question of notice,* which is always recognized as involving due process of law and, therefore, a federal

question. The whole decision, in fact, is based upon the requirement of the statutes of Washington which guarantee to the citizen notice of the assessment and application for a tax deed, and prescribes in detail the manner thereof. These provisions will be discussed more at length in our argument upon the motion to affirm.

And, finally, upon this head, we come to discuss the question whether it is necessary for the decision of the state court to have passed upon the federal question *in terms*. Counsel say (see p. 15), that "it has been repeatedly held by this court that "the form of a decree of a state court cannot be re-examined in "this court simply because a federal question was presented to "the state court for determination, but that that court must also "have decided it;" citing, among other authorities, a note on page 42 of Vol. 63, L. R. A. The citation is itself a sufficient answer to the point, for it there appears, that "a decision of the "federal question in terms is not essential. If a decision of such "question was *necessarily involved* in the judgment rendered, it "is not a matter of importance that the state court avoided all "reference to the question." Citing the following cases:

Chapman vs. Goodnow, 123 U. S., 540.
Chicago vs. Needles, 113 U. S., 574.
Bells Gap Ry. vs. Pennsylvania, 134 U. S., 232.
St. Louis, etc. vs. Illinois, 185 U. S., 203.
Chicago Ry. vs. Chicago, 166 U. S., 226.

In the case last cited this court says: "It is true that the "Supreme Court of Illinois did not, in its opinion, expressly "refer to the Constitution of the United States. But that cir- "cumstance is not conclusive against the jurisdiction of this "court to re-examine the final judgment of the state court. The "judgment of affirmance necessarily denied the federal rights "thus specifically set up by the defendant for that judgment "could not have been rendered without deciding adversely to "such claims of right."

How could there be a clearer case of denial of the constitutional guaranty to plaintiff in error than is shown by the proceedings by which plaintiff's property was taken? No question

other than the absolute *want of notice* appeared in the case and none other was possible to present.

Counsel also cite, Telluride Power Co. vs. Rio Grande, 187 U. S., 569, and quote the remarks of the court in that case as follows: "But their rights under that section depended upon ques-"tions of fact and questions of local law. The questions of fact "were found against plaintiff in error, and the questions of local "law we cannot review." Counsel then proceed to say. "Upon "all these questions of fact the state courts found against the "plaintiff." But this statement is not supported by the record. The record shows that the facts as alleged by plaintiff are absolutely uncontroverted, but on the contrary, stand admitted by them.

It is true that the state courts found against plaintiff upon the questions *of law*,—that is, upon the *legal effect* of the facts. But that is the very question in issue here—do the facts, as shown by the record, establish a want of due process of law? It is not necessary or important that the federal claim shall be meritorious, for that is the precise question which is given to this court to decide.

It is said by counsel for defendants, in summing up the grounds of our objection to the tax proceedings, that in the assessment roll, and the judgment record, the name of the owner was *improperly* given; but on the other hand, it will appear from the record that the name of the owner was not given at all from the beginning of these proceedings to the end of them, and there is no suggestion on the part of plaintiff in error that it was "improperly" given. Again, counsel say that another ground of our objection was "that *personal* notice was not given to the plaintiff of the application for the tax deed;" but it will appear from an examination of the record that no claim of the want of *personal* notice was ever made in these proceedings. Again, it is stated as another ground of our objection, "that the affidavit of notice was *insufficient*," but the only contention concerning the affidavit is that upon its face it showed that the *provisions of the statute had not been complied with.* The other grounds stated by counsel were not in issue in the Supreme Court.

We do not doubt that when this court is considering an appeal directly from one of the Federal Courts it will be governed in its decision concerning matters relating to taxation, by the rule adopted in the State Court; but even to this broad rule there are exceptions, as appears in the case of

Lewis vs. Monson, 151 U. S., 545.

It is there stated by Mr. Justice Brewer that "where it is "claimed that some right protected by the federal constitution "has been invaded," the rule of the State Court will not be followed; and in that case the question arose upon a *mere rule of evidence* concerning the admissability of testimony.

But where the appeal is from a decision of the State Court itself, as in the case at bar, and this court has jurisdiction to entertain the appeal, it will decide for itself whether a federal right has been invaded; and in determining this question it will give its own construction to the constitution and laws of the United States adopted for the protection of the rights and liberties of its own citizens. The very question in issue and which it is called upon to decide is the violation of a federal right.

If, however, the decisions of the State Court concerning the validity of the assessment under the statute complained of are of any force in this court, we have abundance of authority from that court sustaining the position taken by the plaintiff in error, namely: that the name of the owner is a necessary prerequisite to a valid assessment. It was so held specifically and unequivocally in the following cases:

Baer vs. Choir, 7 Wash., 631.
Vestal vs. Morris, 11 Wash., 451.
Coolidge vs. Pierce County, 28 Wash., 95.

This rule has been followed and adopted in the federal court in the following cases:

N. P. R. R. Co. vs. Galvin, 85 Fed., 811.
State Trust Co. vs. Chehalis, 79 Fed., 282.

In the Galvin case, *supra*, His Honor, Judge Hanford, used this language in discussing an assessment made for the very year in question here, namely, 1891: "*The name of the owner is ne-*

"cessary to a valid assessment of real estate under the statute in "force in 1891, *because it is, in contemplation of the law, an "essential part of the notice of the initiation of proceedings to "create a tax lien."* He accepts the rule laid down in the cases just cited from the Supreme Court of the State of Washington "as being *rules of property* in this state;" and proceeding to discuss the power of the legislature concerning judgments for taxation, he says: "It is contrary to the principles of our govern- "ment for the legislature to make a law giving conclusive effect "to a judgment rendered by a court acting without having juris- "diction."

Previous to the decision in the case at bar it had been uniformly held by the highest court of the State of Washington that the name of the owner was an essential part of the notice and that an assessment which was not made in the name of the owner was invalid and void.

The rule of federal decision where the opinion of the State Court is a matter of importance, is:

1. If the state decisions *are conflicting*, the Federal Courts will follow their own judgment.

2. Even if the rule of the State Court is settled, but was announced after the rights in question attached, the state decisions will not be binding.

In the case of Stutsman vs. Wallace, 142 U. S., 293, it was said that: "It is well settled that upon the construction of the "constitution and laws of a state, this court, as a general rule, "follows the decisions of her highest court *unless they conflict "with or impair the efficacy of some provision of the federal con- "stitution,"* etc. And in Burgess vs. Seligman, 107 U. S., 20, it was said that: "When contracts and transactions have been "entered into, and rights have accrued thereon, under a particu- "lar state of the decisions, or when there has been no decision of "the state tribunals, the Federal Courts properly claim the right "to adopt their own interpretation of the law applicable to the "case, although a different interpretation may be adopted by "the State Court after such rights have accrued." And in Anderson vs. Santa Anna, 116 U. S., 356, it was said that:

"While the courts of the United States accept and apply the "construction of a state constitution or of a local statute upon "which the rights of the parties depend, which has been fixed "by the course of decisions in the State Court, it is the settled "doctrine of this court that rights accruing under one construc- "tion will not be lost merely by a change of opinion in the State "Court; and where such rights have accrued before the State "Court has announced its construction, the Federal Courts, al- "though leaning to an agreement with the State Court, must "determine the question upon their own independent judgment."

All the other authorities cited by counsel at pp. 20-23 of their argument, are to the same effect. They do not touch the question in the case at bar, because there is no claim made in any of them that the notice provided for by the statute had not been given.

POINTS III-IV.

The contention "that there is no federal question involved "in this case" (Point III) should be coupled, in the discussion, with the motion to affirm (Point IV.)

In support of the motion to affirm, counsel offer no argument except the citation to Merchants' Bank vs. Pennsylvania, 167 U. S., 461, and King vs. Mullins, 171 U. S., 404. Both these cases relate to the sufficiency of certain *statutes* as constituting due process of law. The court held that the statutes were ample in this respect. No question of proper notice appears in those cases.

The grounds upon which the state court rendered its decision are correctly stated in the opinion, quoted above, which show that plaintiff relied upon the fact, as established by the record, that the defendant acquired no title to the property by virtue of the tax proceedings, because.

1. The property was not assessed in the name of the owners.

2. No notice of the sale of the property was given to the owners.

3. No notice of the expiration of the time of redemption or of the application for a deed, was given to the owners.

Upon these contentions, the state court held that while it was true that the provisions of the statute had not been complied with (as shown by the uncontested facts in the record) still, proceedings under that statute were proceedings *in rem* and therefore no notice was necessary.

A separate consideration of these questions will best conduce to a correct understanding of the law of this case.

THE ABSENCE OF THE NAME OF THE OWNER IN THE ASSESSMENT ROLL.

The statute under which this property was assessed (as found by the state court), was Section 49 of the act of 1890, (Laws Wash., 1890, p. 623) and which read as follows:

"The assessor shall make out in the real property assessment "book, in numerical order, complete lists of all lands or lots sub- "ject to taxation, showing *the names of the owners*, if to him "known, and if unknown, so stated opposite each tract or lot," etc.

The state court found, from the record, that the property in question here was *not* assessed in the *names of the owners;* and that it was not stated opposite the description that the owner was *unknown*. But it held that these omissions were immaterial; because the act provided for a proceeding *in rem*, and that when the court had possession of the *res*, no notice to the owner was necessary. The court does not state just how its jurisdiction of the *res* was acquired, unless it was by virtue of the act itself; certainly not by any *process* or notice, which was issued or given to the owners, because it is not contended that the record establishes any such fact. The record shows that the property was assessed in the name of one "C. Winehill," as the owner. It is admitted that Henry S. Woodward and Sarah, his wife, were the sole owners of the property at the time of the assessment. Furthermore, the public records showed this fact, and the deed is in the record. (See Transcript, p. —.) It has been held that the public records constitute notice to the assessor and that he is bound by what the record shows in this respect.

See State Trust Co. vs. Chehalis, 79 Fed., 282, and the authorities there cited.

In the case of Marx vs. Hanthorn, 148 U. S., 172, it was said by Mr. Justice Shiras: "As there must be express statute "authority for selling land for taxes, and as such sale is in the "nature of an *ex parte* proceeding, there must be, in order to "make out a valid title, a substantial compliance with the pro- "visions of the law authorizing the sale. *A statutory power to "be validly executed, must be executed according to the statutory "directions.* It is no doubt true that there may be provisions in "tax laws that are made in the interest of the public, and which "do not concern the tax-payer; and a failure to punctiliously "observe them may furnish him with no just ground of com- "plaint. But the well-established rule is as above stated, that "observance of every safe-guard *to the owner* created by the "statute is *imperatively necessary.* So, too, it is the rule, when "not modified by the statute that the burthen of proof is on the "holder of a tax deed to maintain his title by affirmatively show- "ing that the provisions of the law have been complied with."

In that case the question turned on whether it was necessary under the Oregon statute to give notice to the owner. The statute did not in terms require the name of the owner to be given, but the lower court held that the fair meaning of the statute was that the name of the owner should appear in the notice of sale; and that "notice that the property of Ida J. Hawthorn was to "be sold was not only not notice that the property of Ida J. "Hanthorn was to be sold, but was actually misleading, and "that such want of notice or misleading notice vitiated the sale." This court approved the rule adopted by the lower court in the following language: "We agree with the court below in think- "ing that the reasonable meaning of the statutes regulating no- "tices and sales of property for taxes is that such notice and "advertisement should give the correct names of those whose "property is to be sold."

By what course of reasoning, then, can it be said that the requirement of the statute of Washington that the "name of the "owner shall be stated if known, and if unknown so stated," was not an essential requirement? And how can it be contended that this requirement was satisfied by assessing the property to "C. "Winehill," when the acknowledged owners were Henry S. and

Sarah Woodward? Upon what theory can it be said that this requirement is not as imperative or mandatory as the requirement to describe the land correctly?

The distinction between what are mandatory, and what are directory, provisions in tax laws is well stated in Lyon vs. Alley, 130 U. S., 177, where the court adopts and re-affirms the rule laid down in French vs. Edwards, 13 Wall., 506, to the effect that "statutory requisitions intended for the guidance of the officers "in the conduct of business devolved upon them * * * re-"gulations designed to secure order, system and dispatch in the "proceedings" are not generally mandatory. "But when the "requisitions are intended for the protection of the citizen, and "to prevent a sacrifice of his property, and by a disregard of "which his rights might be and generally would be injuriously "affected, they are not directory, but mandatory. They must "be followed or the acts done will be invalid." And then there follows this significant statement: "The provisions of statutes "as to the form and mode of assessments, as to tax lists, and the "place where the tax lists are to be deposited, are according to "the highest authority, designed for the benefit of th tax-payers, "and the protection of their property from sacrifice." See also

Corporation vs. Pratt, 8 Wheat., 681.
Martin vs. Barbour, 140 U. S., 634.
Early vs. Doe, 16 How., 610.

Cooley Taxation (3rd Edition) p. 928, makes use of the following very pertinent language:

"There is no constitutional provision entitling one to notice "in a *particular* mode; what the statute has made sufficient must "be deemed so. * * * Whatever the provision is it must be "*complied with strictly*. This is one of the most important of "all the safeguards which has been found necessary to protect the "interest of parties taxed, and nothing can be a substitute for "it or excuse the failure to give it. The notice being a prere-"quisite to the officer's authority, the fact that in the particular "case it can be shown that the party concerned was fully aware "of the proceedings will be of no avail in supporting them. He "is under no obligation to take notice of the proceedings unless

"*duly* notified. Mere informalities or unimportant variances in "an attempt to comply with the law may not be fatal, but vari- "ance in substance cannot be overlooked. * * * The notice "is bad if it differs from the assessment in giving the *name of the* "*person* to whom the land is taxed; or if it fails to give the *name* "*of the person taxed* when the *statute requires* it."

The Supreme Court of Washington in a decision rendered since the decision in the case at bar, adopts this same rule. See State vs. McConnaughey, 33 Wash., 571, and particularly pp. 575-577.

"In every system of assessment and taxation its seems to "have been the general rule in this country that the *person to be* "*assessed* shall be notified and given an opportunity to be heard "at some time in the progress of the proceeding; and this is re- "quired by due process of law." Such is the language of Camp- bell vs. Dwiggins, 83 Ind., 482; citing among other authorities, Davidson vs. New Orleans, 96 U. S., 97.

It was said in Heth vs. City of Radford, 31 S. E., (Va.), 8: "Imposing taxes or levies is a taking of property. The owner "is entitled to be heard before the charge is fully established "against him. If he is not afforded an opportunity to be heard "upon the question of the assessment of his property for taxa- "tion, the tax or levy is unlawfully exacted of him; for other- "wise he is deprived of his property without due process of law, "in violation of the fourteenth amendment to the constitution of "the United States."

In Von Stein vs. Trexler, 23 S. W. (Tex.), 1046, it is said: "It is an elementary principle that before a man can be deprived "of his property for public use, he must have notice of the pro- "ceeding whereby it is sought to appropriate his property. * * "* * All the authorities agree that due process of law requires "that a person shall have reasonable notice, and a reasonable op- "portunity to be heard before an impartial tribunal."

In this connection we concede the correctness of the rule as laid down in Leigh vs. Green, — U. S., —, (24 Sup. Ct., 390), so confidently cited by defendants and said by them to be decisive of this case; but it has absolutely no bearing upon the facts in

the case at bar. The whole question presented in the Leigh case was whether a statute of the state of Nebraska which failed to provide for the service of *personal* notice upon a lien-holder, before a sale of property for taxation could be had, constituted due process of law. This court held that *personal* notice was not necessary; that substituted notice might be given instead, *if the act so provided.* The act provided for notice by *publication,* and that form of notice was *strictly complied with.* No such question appears in the case at bar. It is conceded here that the statute itself under which the assessment was made, and also the statute under which the deed was executed, prescribed ample notice; but it is contended that the statute *was not complied with* in any respect. The state court held, that while it was true that the statute had not been complied with, the omission was immaterial, a mere irregularity, and did not affect any substantial right of the plaintiff,—in other words that it was not necessary to comply with the statute.

Some form of notice, then, being absolutely essential to constitute due process of law in the taking of private property for purposes of taxation, the want of notice certainly constitutes want of due process of law.

FAILURE TO NOTIFY THE OWNER OF THE EXPIRATION OF THE PERIOD OF REDEMPTION.

The legislature of the State of Washington has adopted what is known as the Illinois statute concerning notice to the owner of the time of expiration of the period of redemption. This statute is found at Sections 127, 128 of the Laws of Washington for 1893, p. 380, and is set out below with the proof of compliance therewith. In brief, the statute requires that the purchaser at a tax sale shall not be entitled to a deed until he has complied with the following conditions:

1. He must serve a notice of the expiration of the period of redemption, on *every* person in *actual possession or occupancy* of the land;

2. He must also serve the notice on the person in whose

name the property was assessed, and also upon the "owners of "and parties interested" in the property, if they can be found in the county.

3. He must make an affidavit *before* a deed can be issued to him, showing that he has complied with these conditions, "stating particularly the facts relied on as such compliance."

The statute and the proof of compliance are as follows:

"SEC. 127. Hereafter no purchaser, or assignee of such "purchaser, of any land, town or city lot, at any sale of lands "or lots for taxes or assessments, penalties, interest and costs, "due either to the state or county, shall be entitled to a deed for "lands or lots so purchased, UNTIL THE FOLLOWING CONDITIONS "HAVE BEEN COMPLIED WITH, to-wit: Such purchaser, or assignee, "shall serve or cause to be served a written or printed or partly "written and partly printed notice of such purchase, on EVERY "*person in actual possession or occupancy* of such land or lot; "also the person in *whose name the same was assessed* or taxed, "if upon diligent inquiry he, or she, can be found in the county; "also the *owners of and parties interested* in said land or lot, if "they can, upon diligent inquiry, be found in the county, at "least three months before the expiration of the time of redemption on such sale; in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of "the land or lot he has purchased, for what year taxed, or specially assessed, and when the time of redemption will expire. If "no person is in possession or occupancy of such land or lot, and "the person in whose name the same was taxed or assessed, upon "diligent inquiry cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper "of general circulation in said county in which said land or lot "is situated, which notice shall be inserted three times—the first "time not more than three months and the last time not more "than one month before the time of redemption shall expire: "Provided, however, that if the owners of said land or lots, or "the parties interested therein, cannot be found in the county, "and the person in actual occupancy is tenant to or is in possession under the owner or party interested therein, then service "of said notice upon such tenant shall be deemed service upon

"the owner or party interested: And provided further, that if "the owners, or parties interested are unknown to such purchaser "or his assignee, then said publication, as to them, may be to the "unknown owner or parties interested."

"SEC. 128. Every such purchaser or assignee, by himself "or agent, shall, BEFORE HE SHALL BE ENTITLED TO A DEED, make "an *affidavit of his having complied with the conditions of the "foregoing section, stating particularly the facts relied on as "such compliance*, which affidavit shall be delivered to the county "treasurer, and which shall by him be filed and carefully pre- "served with the records of his office, and which record or affida- "vit shall be prima facie evidence that such notice has been given. "Any person swearing falsely in such affidavit shall be deemed "guilty of of perjury, and upon conviction thereof shall be pun- "ished accordingly."

The proof of the compliance with statute, is as follows:
(See Transcript, p. —.)

"J. W. McConnaughey, being first duly sworn, on oath de- "poses and says: that he is the agent of H. C. Taylor, the person "whose name is subscribed to the notice of application for tax "deed, a copy of which is hereto attached; that he has made care- "ful and diligent *search and inquiry* for the person in whose "name the lot in said notice described was taxed, and finds the "same to have been taxed to C. WINCHELL and for the *owners "of and persons interested* in said lot, viz.: GUSTAVE WINEHILL "AND MATTIE FORD, who are named in said notice and to whom "said notice is addressed, and that SAID persons cannot be found "in said county of King, State of Washington; that he published "the original notice, of which the attached is a true copy in The "Argus, a newspaper of general circulation in said county of "King, in which the land in said notice described is situated; "that said notice was inserted three times in three regular and "separate editions of said newspaper, the date of the first inser- "tion and publication being on the 2nd day of January, 1897; "the date of the second insertion and publication being on the "9th day of January, 1897, and the date of the last publication "being on the 16th day of January, 1897; the first publication

"being not more than three months and the last not more than "one month prior to the date of the expiration of the time of "redemption of said property from tax sale.

"J. W. McConnaughey."

Now it will be observed that the affidavit, which the statute says shall be the proof of compliance, upon which the purchaser may be entitled to a deed *fails* to show compliance in the following particulars:

1. It fails to show that the notice had been served upon *every*, or in fact, upon *any* person in "actual possession or occu- "pancy" of the property.

2. It fails to show that the notice was served on Sarah Woodward and the estate of Henry S., deceased, the owners of the property.

3. It fails to show that the notice was served on all the "parties interested" in the property, other than it states that *search* and *inquiry* was made for "Gustave Winehill and Mattie "Ford," as the owners and parties interested, and that *they* could not be found in the county. No mention is made of Sarah Woodward and the estate.

4. It fails to state that the notice was *served* on anybody. It merely states that "*search and inquiry*" was made.

Upon the trial the defendants sought to supply the defects in the affidavit as the following extract from the testimony will show. (See Transcript, p. —.)

"Mr. Abbott: I offer in evidence plaintiffs' identification 'B.'

Mr. Jones: I would like to ask the witness *for information* a few questions *before objecting* to this.

Q. (Mr. Jones) I find here in these files of papers, Mr. McConnaughey, a notice and proof of service of the notice for an application for a tax deed on L. Gemechi, who was he?

A. He was a tenant.

Q. A tenant of this property?

A. Yes, sir.

Q. And H. Freedman, who was he?

A. He was a tenant.

Q. And Oscar Knox, who was he?

A. He was supposed to be representing the owner of the property as I understood—I got that from the tenants.

Q. And Sarah Woodward, the plaintiff?

A. Yes.

Q. A. Lombardini, who was he?

A. A tenant.

Q. And Benjamin Greenburg, who was he?

A. He was a tenant.

Q. *Were those all the tenants of the property at that time?*

A. Yes, sir; that is they were all of the *separate* tenants. yes. Lombardini had a lease on the upper floors and had control of that part of it.

Q. These tenants were tenants of Sarah Woodward, the plaintiff in this action.

A. Yes.

MR. GILMAN: I object to all that as irrelevant and immaterial. The record itself shows what it is and it is not for the witness to say what it is."

The objection was sustained.

Why this attempt to correct the record, if not because of a consciousness of its defects? The witness stated what he should have stated in his affidavit, namely, that Gemechi, Freedman, Lombardini and Greenburg were *tenants* of Sarah Woodward; but it seems that even now, he is unwilling to say that there were not still other persons in possession or occupancy, for when he was asked if these were all the tenants he said "they were all the *separate* tenants"—from which it should be inferred that there were other persons in possession or occupancy. It will be observed that the statute distinguishes between *occupants* and *tenants*, for it says that the notice must be served upon "every person in actual *possession* or *occupancy;*" and also that if "the person in actual occupancy is tenant," etc.

The Washington statute was adjudicated by the Circuit Court of Appeals in the case of Coulter vs. Stafford, 46 Fed., 564; and the construction there given was adopted and approved

by the Supreme Court of Washington in Herrick vs. Neisz, 16 Wash., 74. The following remarks in the former case are in point here:

"Under the law as it existed at and prior to the *time when "the deed was made,* the sheriff *was not authorized* to execute the "deed, unless the affidavit as to the service had been made, pre- "sented, and filed as the law provided. Although the deed was "prima facie evidence under the laws of Washington of 'the "regularity of all other proceedings, from the assessment by the "assessor, inclusive, up to the execution of the deed,' yet the "authority to execute the deed is not shown. The *statute must "always be examined in order to ascertain the authority of the "officer to execute the deed.* After examining the provisions of "the statute, it does not appear upon the face of the deed that "the sheriff had any authority to execute it, and, *no authority* "for its execution *being shown,* it is *absolutely null and void,* "and wholly insufficient to put the statute of limitations in mo- "tion."

The Illinois statute has received the lengthy consideration of this court in

Gage vs. Bani, 141 U. S., 344.

It would be folly to attempt to add to the argument advanced by the court in that case. It is decisive of this case in every respect.

But we urge upon the attention of the court the rule that the statute having been adopted from Illinois, the construction of the courts of that state was adopted with it. We, therefore, direct particular attention to the following points, which are applicable to the case at bar and which have been decided by the Illinois courts:

I. It is there held that the provisions of the statute must be *strictly* complied with, and that the facts relied upon to *prove compliance* must appear *in the affidavit.* See

Davis vs. Gosnell, 113 Ill., 121.
Price vs. England, 109 Ill., 395.
Gage vs. Hervey, 111 Ill., 305.

Gage vs. Mayer, 117 Ill., 632.
Stillwell vs. Brammell, 124 Ill., 338.
Gage vs. Stewart, 127 Ill., 207.
Combs vs. Goff, 127 Ill., 431.

In Gage vs. Meyer, *supra*, it was said: "The execution of "the deed rests *entirely* upon the *sufficiency* of the affidavit filed "with the clerk, upon which it was issued. *Parol evidence cannot "be introduced to supply defects or omissions in the affidavit.* "The statute only authorizes a deed to be executed upon an affida- "vit being filed which contains certain specified facts. If the "affidavit does not contain the specified facts the deed is un- "authorized and nugatory, *regardless of what the real facts may "be* or what may be proved."

The affidavit is the *sole* source of the proof. The language of the statute is that the applicant "shall, BEFORE *he shall be en- "titled to a deed*, make an affidavit of his having complied with "the conditions of the foregoing section, *stating particularly the "facts relied on* as such compliance." Parol evidence is not admissable, at that time or at any time afterwards, to show compliance. The proof is a *condition precedent* to the issuance of the deed. See above citations, and also particularly the following:

Gage vs. Meyer, 117 Ill., 632.
Miller vs. Pence, 132 Ill., 149.
Hughes vs. Carne, 135 Ill., 519.
Perry vs. Bowman, 151 Ill., 25.
Esker vs. Heffernan, 159 Ill., 38.
Wisner vs. Chamberlain, 117 Ill., 568.

II. Failure of the affidavit to state that service was made *on all the occupants or persons in actual possession*, is fatal.

Price vs. England, 109 Ill., 395.
Stillwell vs. Brammell, 124 Ill., 338.

In the case at bar the affidavit makes no reference whatever to *service* on the occupants or persons in possession. Not even *search* was made for any such persons.

III. Failure of the affidavit to state that service was made

on the person in whose name the property is *assessed* is fatal. The assessment was to "C. Winehill"; the affidavit says *search* was made for "C. Winehell." In Illinois it was held that service on "I. Meyer" when the property was assessed to "J. Meyer" was fatal. (See Gage vs. Meyer, 117 Ill., 632.) And that service on "Meyer" was not service on "Meyers." (See Gonzalia vs. Bartelman, 143 Ill., 634.) The rule of *idem sonans* does not apply to such cases.

IV. It is imperative that the affidavit should show service on the *owner or the party interested;* and if it appears from the *facts stated* in the affidavit that the *real owner has not been served,* the deed will fall.

Smith vs. Prall, 133 Ill., 308.
Stillwell vs. Brammell, 124 Ill., 338.
Harding vs. Brophy, 133 Ill., 39.
Smyth vs. Neff, 123 Ill., 310.

It is conceded here that the *real owners,* at that time, were Mrs. Woodward and the estate of her deceased husband.

But it is said by the State Court that he did, in fact, give notice to the agent of Mrs. Woodward. We have already shown that the *affidavit does not so state.* But even if it did so appear, it would not be sufficient because the *statute* does not provide for service of the notice on the *agent.* Would the service of a summons in a civil action upon an *agent* be good notice?

Fortunately this very question had been passed upon in Illinois. See

Gage vs. Waterman, 121 Ill., 115.

We quote:

"Under the Illinois statute, notice of a tax sale must be "served upon the person in actual possession of the land, and "in whose name the same was taxed or specially assessed; and an "affidavit of notice which states that notice of the sale was served "upon the owner of the land, by handing the same *to his legal "agent;* that said owner was the only person in possession of the "property on said date; and that the same was taxed in his name, "—does not show a service upon the owner sufficient to fulfill the "requirements of the statute."

And it must not be forgotten that no notice was given *to the estate*, or to the representatives of the estate of Henry S. Woodward, deceased. This point has also been settled in Illinois. Under the provision of the statute, that notice must be given to the owner or *person interested*, it was held in Harding vs. Brophy, 133 Ill., 39, that where an estate of a deceased person has any interest in the property, it is imperative to serve notice upon the *representative of the estate*. The court says: "The affidavits do "not show, as an excuse for such failure to make personal service, "that the representatives of the estate could not, upon diligent in- "quiry, be found in the county."

GENERAL RULE IN SUCH CASES.

But in case the court should not be satisfied with the rule adopted in Illinois, we cite the following general authorities upon the subject:

Cooley Taxation, p. 1034 (3rd Ed.)
Black Tax Titles, 348, 350 (2d Ed.)
Cessey vs. Cornell, 27 N. W. (Iowa), 365.
Weaton vs. Knight, 16 N. W., 532.
Arthur vs. Smathers, 38 Pa. St., 40.
Doughty vs. Hope, 3 Denio, 594.
Dentler vs. State, 4 Blacf., 258.
Hartley vs. Boynton, 17 Fed., 873.
Walsh vs. Burke, 134 Cal., 594.
Miller vs. Williams, 135 Cal., 183.

Judge Cooley says in discussion of the right to notice of the expiration of the period of redemption, (p. 1034):

"Whatever the statute may make provision for, *subsequent* "*to the sale*, in order to the protection of the interest of the par- "ties having the right to redeem, must be strictly performed. The "reasons which require this are the same that render imperative "a strict compliance with all those provisions which are to be "observed in the interest of the tax-payer *before the sale* is made. "One of the most usual requirements is the publication of a no- "tice to the tax-payer, with perhaps in addition a personal ser- "vice upon the owner in case he is known and is a resident.

"Every provision of this nature must be strictly complied with. "Nothing can be substituted for it by the officers; *the right to* *"it cannot be waived by one who chances to be in possession of* *"the land,* but who has no interest in it, and the owner may rely "on his right to it, and *wait until* he receives it before taking pro- "ceedings to redeem."

Respectfully submitted,

T. O. ABBOTT,
Attorney for Plaintiff in Error.

FILE COPY.

In the Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States of America.

No. 57 October Term, 1905.
(No. 309, October Term, 1904.)

HENRY FRENCH, PLAINTIFF IN ERROR,

v.

H. C. TAYLOR AND LIDA R. TAYLOR, HIS WIFE; J. W. McCONNAUGHEY, D. F. McCONNAUGHEY AND C. K. McCONNAUGHEY,

DEFENDANTS IN ERROR.

Error to the Supreme Court of the State of Washington.

Brief of Plaintiff in Error on Merits.

(Separate Brief on Motion to Dismiss.)

TWYMAN O. ABBOTT,
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PRESS OF GIBSON BROTHERS
WASHINGTON, D. C.
1905.

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Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Plaintiff in Error on Merits.

(Separate Brief on Motion to Dismiss.)

The Motion to Dismiss and Affirm.

A motion to dismiss and affirm was filed by the defendants in error and cited for the opening day of this court at its last October term. Extensive printed argu-

ments were submitted, but the motion was never called up by the defendants.

Plaintiff in error offers no further argument on the motion to dismiss, except such as may incidentally appear in these pages. In opposition to the motion to affirm, however, plaintiff submits the argument herewith upon the merits.

Statement of the Case.

There are five causes of action stated in the complaint but the proceedings have never passed beyond the first cause of action. The facts necessary to a complete understanding of the issues as presented by the record are these:

On, and previous to the year 1891, Henry S. Woodward and Sarah Woodward, his wife, were the owners in fee simple of lot 8, in Block 11, of Maynard's Plat, in the city of Seattle, Washington. This property consists of business property in said city, has extensive improvements upon it, and produces large revenues in the way of rents and profits.

See Complaint, par. IV, Trans., p. 38.
See Deed, Trans., pp. 134–135.

On the 18th day of September, 1892, Henry S. Woodward died in California. He left a will appointing his wife, Sarah, and one Edward Von Tobel as his executors. Von Tobel declined the trust, and the court appointed Mrs. Woodward as the sole executrix.

See Complaint, par. I, Trans., pp. 37–38.

Mrs. Woodward served in this capacity until September 20, 1901, when she resigned her letters, and John H.

McGraw was appointed in her stead.

See Complaint, par. II, Trans., p. 38.

See Answer, par. I, Trans., p. 70.

During the time while the matters in issue here were transpiring, Mrs. Woodward was a citizen and resident of the State of California.

See Complaint, par. III, Trans., p. 38.

See Answer, par. I, Trans., p. 70.

In 1892, the taxing officers of King County, Washington, undertook to assess the property above described for taxes for the year 1891, and for this purpose entered it upon the rolls. In making the assessment they neglected to give any notice to the *owners* as the *statute* required, but they assessed it, instead, to one "C. Winehill." They did not give any notice at all to, nor enter the names of, Henry S. and Sarah Woodward, the owners, anywhere in the rolls.

See Complaint, par. V, Subd. 1, Trans., pp. 39 *et seq.*

See Proof, Trans., pp. 106–107.

Afterwards, the taxes not having been paid, the assessing officers, transcribed the property into a book known as the "Tax Judgment, Sale Redemption, and Forfeiture Record," and took judgment against the property, but again failed to give any notice to the owners, or to enter their names on the rolls, as the law required they should do; but entered it instead as the property of "C. Winchill."

See Complaint, Subd. 5, Trans., p. 41.

See Proof, Trans., pp. 110–111.

See Plaintiff's Exhibit I, Trans., pp. 123–124.

Upon the record as thus made up, the property was forfeited and sold to the county, and afterwards, on the 6th day of February, 1895, it was transferred to the defendant in error, H. C. Taylor.

See Complaint, Subd. 6, Trans., pp. 41–43.
See Exhibit B, Trans., pp. 126–127.

On February 13, 1897, the treasurer issued a pretended tax deed to said Taylor.

See Complaint, Subd. 10, Trans., pp. 45–46.
See Answer, par. III, Trans., p. 77.

Previous to the issuance of this deed, the said Taylor, failed and neglected to give any notice to Mrs. Woodward, or to the estate which she represented, of his intention to apply for the deed, or of the expiration of the period of redemption—which he was specifically required to do by the laws of Washington, and he failed to make the affidavit required by said statute as a condition precedent to the issuance of a tax deed by the treasurer.

See Complaint, Subd. 8, Trans., pp. 44–45.
See Affidavit of J. W. McConnaughey (Taylor's Agent), at Trans., pp. 128.

After proper tender and demand this action was instituted for the purpose of setting aside the said tax proceedings. Before the trial in the lower court, after all the evidence of plaintiff in error had been submitted upon the first cause of action, and before defendants in error had offered any evidence at all, a motion was made and sustained by the court, nonsuiting the plaintiff and dismissing the action. Thereupon an appeal was taken to

the Supreme Court of Washington, with the result that the decision of the lower court was affirmed.

From this decision of the Supreme Court of Washington a writ of error was allowed to this Court, the protection of the first section of the Fourteenth Amendment to the Constitution of the United States having been duly claimed and preserved.

See Plaintiff's Argument upon Defendants' Motion to Dismiss.

Specification of Errors.

Plaintiff in error claims that the Supreme Court of Washington erred in the following particulars, that is to say:

I.

The said court erred in holding that the proceedings shown to have been followed by the taxing officers for the assessment and collection of taxes against the premises in controversy for the year 1891, constituted due and lawful proceedings under the laws of the State of Washington in such cases made and provided, and that said proceedings were not in conflict with nor in violation of section one of Article XIV of the Constitution of the United States, and that the plaintiff in error was not thereby deprived of his property without due process of law.

II.

The said court particularly erred in holding that no notice of the pendency of the alleged proceedings for the taxation of said property and for the enforcement and collection of said taxes for the year 1891, as provided

by the laws of the State of Washington in such cases, was necessary to be given to the owners of said premises.

III.

The said court particularly erred in holding that Sarah Woodward and the estate of Henry S. Woodward, deceased (the sole owners of said premises), were not entitled to receive any notice of the application for the issuance of a tax deed to the defendant in error, H. C. Taylor, prescribed by the laws of the State of Washington in such cases, as a condition precedent to the issuance of a tax deed to the premises in controversy.

IV.

The said court particularly erred in denying to plaintiff in error any relief from the cloud upon his title to said premises, by virtue of said unlawful proceedings, and in affirming the judgment of the superior court of the State of Washington for King County dismissing this action and adjudging costs against plaintiff in error.

Argument upon the Law and Facts.

It will thus be seen that this cause is brought to this court, under the claim of want of due process of law—the basis of the claim being the *absolute want of notice* to the owners of the property, at *any* stage of the taxing proceedings.

The contention of plaintiff in error, so far as this court is concerned, is correctly summarized by the Supreme Court of the State of Washington, in its opinion, as follows:

"The points relied upon by appellants to secure a reversal are, (1) that the property was not assessed in the *name of the owner*, (2) that no *notice* of (*a*) the sale, or (*b*) of the expiration of the time of redemption, or (*c*) of the application for a deed, was given to the *owners;* and (3) that therefore the respondents acquired no title to the land by virtue of the sale and tax deed."

See opening paragraph of Opinion, Trans. p. 136.

There is no controversy here concerning provisions of the statute itself, all such questions having already been determined by the Supreme Court of Washington. That the *statutory* provisions for *notice* were adequate is conceded by plaintiff in error. But it is insisted that these requirements were utterly ignored.

Each of the foregoing points is based upon the plain and specific requirements of the *statutes* under which the assessment and sale were made.

That the statute provided as contended for by plaintiff in error is not in dispute.

That the provisions of the statute in the particulars mentioned were not followed by the taxing officers is not in dispute.

The contention of defendants in error is that these requirements were not essential and that in failing to observe them the rights of plaintiff in error were not affected. Plaintiff in error contends that failure to comply with these requirements deprived him of his property without due process of law.

In other words the first great requisite of due process, namely, *notice* of the pendency of these proceedings, as guaranteed by the statutes, was entirely lacking.

But the Supreme Court of the State of Washington while admitting the failure to comply with these

requirements, held that the proceeding was a proceeding *in rem* and that no notice of a proceeding *in rem* was necessary, and that, therefore, the failure to give the owners of the property notice of the proceedings constituted no infringement of his constitutional rights, whether the *statute* provided to the contrary or not.

At the outset, so that this court may not misunderstand the nature of this appeal, plaintiff in error unequivocally disclaims any intention to controvert these well-defined rules, namely:

1. That the Federal Courts will not interfere in the administration of the local laws of the States; and

2. That the administration of the laws relative to *taxation* simply is generally a matter *exclusively* for the State courts to determine.

Plaintiff's contention rises higher than either of these rules, and does not conflict with them in any respect. It involves the protection of the XIVth Amendment to the Constitution of the United States, which guarantees to him, *due process of law* before his property may be taken from him for public purposes.

This is distinctly a *Federal* question, and in order to determine it, this court is bound to inquire whether the plaintiff in error was duly advised as *required by law*, of the proceedings by which his property was taken. In other words, whether the first great requisite of due process of law, namely, the giving of *notice* to the owners, was observed by the taxing officers. Finding that it has been, this case should be dismissed. Finding that it has not been, it should be remanded, and plaintiff granted the relief sought.

In determining this question this Court is bound to inquire into two principal facts:

1. What did the statutes of Washington provide concerning *notice* to the owner; and

2. How were these provisions observed by the taxing officers.

In assisting this court to arrive at a determination of the first material fact, plaintiff in error concedes that the provisions of the *statutes* of Washington concerning notice to the owner, were ample, and concerning the second, he disclaims any intention to inquire into any mere *irregularities*, and that he will rely wholly upon *jurisdictional* facts. He will contend that the pretended judgment by which he was deprived of his property was taken wholly without *notice*, and therefore without *jurisdiction*, and that it, in consequence is an absolute nullity.

There is a vast difference between the power of this court to review the decisions of the State courts in matters concerning taxation, where the question presented is one of *irregularities* merely, and where it is one affecting the *jurisdiction* of the State court. A judgment entered without jurisdiction is always a nullity. And a judgment by which the property of a citizen is taken from him without giving him the opportunity to be heard which the laws of the land provide, is always a judgment entered without jurisdiction and, therefore, a nullity.

There are a vast number of "irregularities" merely shown in this record, but no point is made of them for the purpose of this appeal except as they affect the question of *notice*.

It was said by this court in the noted case of Chicago,

Burlington and Quincy Ry. *v.* Chicago, that the contention that a person has been deprived of his property without due process of law, is not entirely met even by proof that he had due notice of the proceedings, appeared, and was admitted to make his defence, and that even the forms of procedure prescribed by the statute might be strictly complied with, giving the fullest opportunity to be heard, and yet that the action would be inconsistent with the Fourteenth Amendment; and, speaking through Mr. Justice Harlan, used this language:

"In our opinion a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use without compensation made to the *owner*, is upon principle and authority wanting in due process of law required by the Fourteenth Amendment to the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured *to the owner* by that instrument."

See also Scott *v.* McNeal, 154 U. S. 34.

The general rule is stated at 8 Cyclopedia Law and Procedure, p. 1134, as follows:

"Due process of law requires that the person assessed have notice or an opportunity to be heard at some time before the charge becomes fixed and absolute against him," citing many cases from California, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, and United States.

In Campbell *v.* Dwiggins, 83 Ind. 482, relying upon Davidson *v.* New Orleans, 96 U. S. 97, it was said:

"In every system of assessment and taxation it seems to have been the general rule in this country that the person to be assessed shall be notified and given an opportunity to be heard, at some time in the progress of the proceedings; and this is *required by due process of law.*"

In Heth *v.* Radford, 31 S. E. (Va.) 8, it was said:

"Imposing taxes or levies is a *taking of property.* The *owner* is entitled to be heard before the charge is fully established against him. If he is not afforded an opportunity to be heard upon the question of the assessment of his property for taxation, the tax or levy is unlawfully exacted of him; for otherwise he is deprived of his property *without due process of law,* in violation of the Fourteenth Amendment to the Constitution of the United States."

Every case of which we have any knowledge, where the decision of the State court has been considered final by this court, has been based on the sufficiency of the *statute* itself. Wherever the *method of enforcement* has been the question at issue this court has often asserted its right to decide the question upon the merits.

In Lewis *v.* Monson, 151 U. S. 545, it was stated through Mr. Justice Brewer, that the national tribunals will follow the rulings of the State courts concerning matters of taxation, "except in cases where it is claimed that some right protected by the Federal Constitution has been invaded." Just such a case is the case at bar.

In the case of Bellingham Bay & B. C. Ry. *v.* New Whatcom, 172 U. S. 314, this court, went much further. The *Legislature* of the State of Washington had prescribed for ten days' publication of a notice of a proposed assessment and the owner of the property

contended that this was too short a time, and therefore that he was deprived of his property without due process of law. This court took jurisdiction of the appeal, and seemed to question the unlimited power of the State Legislature, in matters of taxation for, speaking again through Mr. Justice Brewer, it was said that: "It may be that, the authority of the Legislature to prescribe the length of notice is *not absolute and beyond review*, but it is certain that only in a clear case will a notice authorized by the Legislature be set aside as wholly ineffectual on account of the shortness of time. The *purpose* of notice is to secure to the *owner* the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence, in a general way, what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the *owner*, if present and taking ordinary care of his property will receive the information of what is proposed and when and where he may be heard. And the time and place may be such that with reasonable effort he will be enabled to attend and present his objections. Here no question is made of the *form* of notice." The court thereupon, upon these facts, held that the *legislative* provision for ten days' notice was sufficient, and that inasmuch as that provision had been *strictly complied with*, it would leave the parties where the Supreme Court of the State had left them; again stating that it must appear that some fundamental guaranty of the Federal Constitution had been invaded before this court will interfere with the State laws.

The important case of Scott *v.* McNeal, 154 U. S. 34; which came from the State of Washington, contains a summary of many principles which are applicable to the case at bar. It was held by the Washington Court in that case that one who had been absent and unheard of for a period of seven years was conclusively presumed to be dead, and that the proceedings in the Probate Court adjudging him dead and distributing his estate constituted due process of law, and were therefore binding upon all the world. This court took jurisdiction of the case upon the ground that it was incompetent for the Probate Court to take the property of a living person, *without notice* to him, and distribute it to his creditors or heirs.

Almost every State in the Union recognizes the rule that statutory requirements for assessing property in the name of the owner, are *mandatory*, and must be complied with strictly. See the long list of authorities cited from thirty States, and also from the United States Courts, at Vol. 27 Am. & Eng. Ency. Law p. 673.

This court has so held in the case of Lyon *v.* Alley, 130 U. S. 177, following the rule previously laid down in French *v.* Edwards, 13 Wall. 506, to which reference is made in our argument upon the notice to dismiss at p. 18, where it is said: "The provisions of statutes as to the form and mode of assessments, as to tax lists, and the place where the tax lists are to be deposited, are according to the highest authority, designed for the benefit of the tax-payers, and the protection of their property from sacrifice."

Judge Cooley has laid down this same doctrine.

"There is no constitutional provision entitling one to notice in a *particular* mode; what the statute has made sufficient must be deemed so. * * * Whatever the provision is it must be *complied with strictly*. This is one of the most important of all the safeguards which has been found necessary to protect the interests of parties taxed, and nothing can be a substitute for it or excuse the failure to give it. The notice being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them. He is under no obligation to take notice of the proceedings unless *duly* notified. * * * The notice is bad if it differs from the assessment in giving the *name of the person* to whom the land is taxed; or if it fails to give the *name of the person taxed* when the *statute requires* it," etc.

See Cooley, Taxation (3d edition), p. 928.

And it is held by the same authorities that if the name of the owner might have been ascertained by the assessor from the public records or other available sources of information, an assessment to an unknown owner is void. This rule has also been laid down by the Circuit Court of the United States for the State of Washington, construing the statutes of that State, in the case of—

State Trust Co. *v.* Chehalis Co., 79 Fed. 282.

In a recent Oregon case (Lewis *v.* Blackburn, 69 Pac. 1024), the question of the right of the owner to a strict compliance with the statute requiring his property to be assessed in his name, was ably considered. The provision of the Oregon statute is similar to that

of Washington, requiring that the owner's name shall be inserted in the rolls opposite the description of the property, except where it is unoccupied land; if the owner's name is unknown or cannot be ascertained by diligent inquiry, then it may be assessed to "unknown owner." In the case referred to the assessor failed to insert the name of the owner, but instead he assessed it to "owners and claimants, known and unknown." The court held the assessment and deed void upon the ground that it was made in the alternative; that if the owner was known his name should have been inserted; if he was unknown the assessor should have so stated. The court concludes by laying down the rule so often announced elsewhere, and by this court itself, that, "The requirement of the statute that the assessment should be made in the name of the owner, if it can be ascertained, is for the protection of the tax-payer and to prevent a sacrifice of his property. Its strict observance, therefore, is imperative and essential to jurisdiction. If in such case the assessment be made in the name of a person who *is not* the owner, or to persons unknown, it is void." (Citing cases.)

The rule here laid down fits the case at bar exactly. The property was assessed "in the name of a person who was not the owner."

Basis of the Decision in the Case at Bar.

The State Supreme Court arrived at the conclusion which it did in the case at bar upon the theory that the revenue law under which the property was assessed provided for a proceeding *in rem*, and that in *such* a proceeding no notice to the owner was necessary, not-

withstanding the provision of the statute that such notice must be given.

See Opinion, Trans., p, 136.

In presenting this question we can admit, without argument, that the statutes under which appellant's property was assessed and proceeded against provided for an action *in rem*, that is, as that term is commonly used, to distinguish it from a proceeding purely *in personam*. Therefore we do not take issue concerning the *nature of the* action.

But we do insist that the method prescribed by that statute for *notice* to the owner was essential to due process of law, and must be followed.

RULE ADOPTED BY SUPREME COURT OF WASHINGTON WAS FORMERLY AS CONTENDED FOR BY PLAINTIFF.

And it must be remembered that the Washington Supreme Court had uniformly decided the rule to be as is now contended by plaintiff, in several cases which had been followed by the Federal courts, and the rule had become a fixed *rule of property* in that State. Below we cite the cases referred to, together with many others from that court, and consider them at length for the purpose of invoking the jurisdiction of this court according to the following well-defined rules, namely:

That the Supreme Court of the United States is not bound to follow the decisions of the State courts in the following cases:

1. Where the question has previously been decided the other way by a Circuit Court of the United States.
2. Where the State decisions are *conflicting*.
3. Where the rule of the State court was announced *after* the rights in question attached.

Some of the authorities to support this contention are found in the argument upon the motion to dismiss, as follows:

Stutsman *v.* Wallace, 142 U. S. 293.
Burgess *v.* Seligman, 107 U. S. 20.
Anderson *v.* Santa Anna, 116 U. S. 356.
Pease *v.* Peck, 59 U. S. 595.

In Pease *v.* Peck, this court laid down the following clear rules to govern its decisions in such cases: We quote:

"When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions, and much more in this case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent. Cases may exist also when a case is got up in a State court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound *in any case*, in which a point is first raised in the courts of the United States, *and has been decided by a Circuit Court*, to reverse that decision contrary to our own convictions in order to conform to a State decision made in the meantime."

The language of this case brings us squarely within the rule upon *all* of the grounds above contended for—not one only. If we can sustain this position then, undoubtedly, the question is now presented to this court for the exercise of its own untrammelled judgment.

I.

Former Adjudication by a Federal Circuit Court.

The case upon which we rely to sustain this point is the case of—

Northern Pacific Ry. Co. *v.* Galvin, 85 Fed. 811.

The decision is so important in all its details, and was evidently so well considered by the learned judge who wrote the opinion that we quote it in full.

We do this for several reasons, but principally for these two, viz: (1) that it is a decision upon the *identical statute in question here*, and (2) that it is a decision of a United States Circuit Court upon a question concerning which the decisions of the Supreme Court of the State are *now conflicting*, but which were at that time (and at the time when appellant's rights accrued) *absolutely uniform*. (See 11 "Cyc." pp. 900–908, and the rule as above discussed.)

In reading this opinion we beg the court to note these two very important facts, viz: (1) that the decision relates to the *very act* in question here, and (2) that it turns upon the *very question* in issue here, that is, want of notice *to the owner* of the property. The decision, upon the merits, is in full as follows (the emphasis, of course, being ours):

"The object of this suit is to restrain the treasurer of Lewis County from proceeding to sell lands in said county, claimed by the plaintiff as part of the grant to the Northern Pacific Railroad Company, to aid in the construction of its main and branch lines, pursuant to a judgment rendered by the superior court for Lewis

County against said lands for taxes *for the year 1891*. The judgment is a judgment *in rem*, ordering that the lands be sold, and was rendered at a time when all the property and assets of the Northern Pacific Railroad Company situated in this State, including said lands, were in the legal custody of receivers appointed by this court." (Here follows a discussion of some preliminary matters of procedure in the action.)

"I deem it unnecessary to take notice of some of the minor objections to the proceedings of the county officers, in making up the assessment roll and tax levy for the year 1891. Some of the objections are necessarily fatal, and it is sufficient for me to point them out as the grounds for my decision. The statute in this State in force at the time of making the assessment required the assessor to list all lands in the county subject to taxation, in an assessment book containing a description of each tract of land listed, the *name of the owner* of each tract, if known to the assessor, the number of acres in each tract, and the valuation placed thereon. These requirements were not observed by the assessor. The assessment book and the tax roll made therefrom contained but an imperfect description of the lands in controversy, and, instead of being listed as the property of the Northern Pacific Railroad Company the *names of other persons* are given *as owners*.

"The railroad company had previously made contracts to sell these lands, but said contracts were not conveyances of the legal title; and it is not alleged in the answer, nor shown by any testimony, that the persons *named as owners* were the purchasers, nor that the *owners* of the lands was *unknown* to the assessor. There is good reason to presume that the assessor did know that the Northern Pacific Railroad Company was the owner, for the contrary is not alleged; and it is shown by the deputy assessor who made up that part of the assessment book containing the list of these lands that he listed the lands from a statement furnished by Paul Schulze, who was the Western Land Agent of the North-

ern Pacific Railroad Company. The NAME OF THE OWNER IS NECESSARY TO A VALID ASSESSMENT of real estate *under the statute in force in* 1891, because it is, in contemplation of the law, *an essential part of the* NOTICE of the *initiation* of proceedings to create a tax lien The decisions of the Supreme Court of this State holding that where an assessor has failed to comply with the requirements of the statutes of this State, providing that in *listing* real estate for taxation the *name of the owner* must be shown, preclude any discussion of the question in this court. I must accept the decisions in the cases of Baer *v.* Choir, 7 Wash. 631, 36 Pac. 286, and Vestal *v.* Morris, 11 Wash. 451, 39 Pac. 960, as being *rules of property* in this State.

"The ORIGINAL illegality in the assessment book for 1891, as affecting the lands in controversy, has not been cured by the judgment rendered against the lands, and it is my opinion that the superior court had *no jurisdiction* to render the judgment. The revenue law of 1893 contains a provision that suits to collect unpaid taxes of 1891 shall be instituted in 1894, at the time and in the manner specified in said act. (Laws Wash. 1893, p. 385; §136.) The manner of instituting suits for the collection of unpaid taxes prescribed by the act is for the county treasurer to publish an advertisement, giving notice of intended application for judgment for sale of delinquent lands and lots, in a newspaper published in his county; and the law provides that said advertisement shall contain a list of the delinquent lands and lots, upon which the taxes remain due and unpaid, the *name of the owner* of each tract or lot if known, the total amount due thereon, and the year or years for which the same are due. (*Id.*, p. 366, §96.) The treasurer is also required to transcribe, in a book prepared for the purpose, and known as the "Tax Judgment, Redemption and Forfeiture Record," a list of the delinquent lands or lots, which shall be made out in numerical order, and which shall contain all the information to be recorded, at least five days before the

commencement of the term at which application for judgment is to be made, which book shall set forth the *name of the owner*, the proper description of the land, the year or years for which the taxes or assessments are due, the valuation on which the tax is extended, the amount of the taxes and assessments, together with the penalties, interest and costs charged against such land. (*Id.*, p. 369, §101.) The advertisement and the record so to be published and made, *constitute the process* and the *notice* to *property owners essential to the jurisdiction of the court.* If omission from the assessment book of the name of a known *owner* of real estate renders the assessment void, as the Supreme Court of this State has held in the cases referred to above, the same consequences must result from the omission of the *owner's name* from the published advertisement and the record. *The court could not render a valid judgment without giving notice* TO THE OWNER of the property to be affected. There was no actual notice to the Northern Pacific Railroad Company, or the receivers in charge of its property, nor appearance by them, nor waiver of notice, and the court could not have jurisdiction to render a judgment where the treasurer failed to publish the notice and make the record prescribed by the statute." (Then follows a discussion of a provision of the act prescribing, the manner of *correcting* irregularities in tax proceedings. Laws Wash. 1893, p. 372, §105, and the learned court concludes thus): "The statute makes a judgment conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable for the tax or assessments. (*Id.*, p. 383, §132.) This provision must be understood as being applicable only to judgments rendered by a court, in the *exercise of jurisdiction* conferred by law. It is contrary to the principles of our government for the legislature to make a law giving conclusive effect to a judgment rendered by a court acting without having jurisdiction."

The learned court, in the opinion above quoted has, as will presently appear, discussed almost every question presented by the case at bar so fully and so forcefully that it seems hardly necessary to add to what is there said. And it is pertinent here to state that the views expressed by the learned judge concerning the necessity of *notice* to the *owner* in tax proceedings have been supported and upheld by this court in every case which has come before it. It is expressly so stated in the cases of Marx *v.* Hawthorn, 148 U. S. 172, freely quoted from on p. 17 of our argument upon the motion to dismiss, where it is said, "A statutory power to be validly exerted, must be exerted according to the *statutory directions*," and that it is a "well-established rule that observance of every safeguard *to the owner* created by the statute is *imperatively necessary*."

How can it be doubted that we have brought the case at bar within the rule contended for, in view of the clear statement of the law in the foregoing cases?

II.

Are the Decisions of the State Court Conflicting?

Let us now inquire concerning the other rule contended for, namely, that the decisions of the State Supreme Court are conflicting. We cite the following cases from the Washington Supreme Court, all of them relating to the right of the owner to notice of tax proceedings, and in which it is generally held (except in

the case at bar) that such notice is essential, and that absence thereof renders the judgment void:

Baer *v.* Choir, 7 Wash. 631.
Vestal *v.* Morris, 11 Wash. 451.
Coolidge *v.* Pierce County, 28 Wash. 95.
Woodward *v.* Taylor (the case at bar).
State *v.* McConnaughey, 33 Wash. 571.
Spokane *v.* Abitz, 80 Pac. (Wash.) 192.
Carson *v.* Titlow, 80 Pac. (Wash.) 299.
Jefferson County *v.* Bank, 80 Pac. (Wash.) 449.
Young *v.* Drooz, 80 Pac. (Wash.) 810.
McMannus *v.* Morgan, 80 Pac. (Wash.) 786.
Anderson *v.* Turatti, 81 Pac. (Wash.) 557.

In the first case Baer *v.* Choir, 7 Wash. 631, the owner of the property was Elizabeth B. Bonnell. The act then in force, (Laws 1871, p. 36), provided that the assessment of occupied land should be made "in the name of the owner or occupant, and *unoccupied* land, if the owner is unknown, may be assessed as such *without* inserting the name of any owner." The land in question was unoccupied land, but it was assessed to one N. B. Knight and not to Elizabeth B. Bonnell. For this the court held the assessment void. The language of the act under consideration in the case at bar, is much stronger than the act which evoked the rule in the case just cited. The provision of the former act is that *all* property shall be assessed in the "name of the owner, if known, and if unknown, so stated"; while the act involved in the Baer case allowed it to be assessed to the "owner or occupant." And yet the Supreme Court of Washington considered the former provision only directory, while the latter was mandatory.

In the next case, Vestal *v.* Morris, 11 Wash. 451, the property was owned by one Bartlett, but it was assessed to Burns. The court said: "The failure to assess the property in the name of the known owner was a substantial failure to comply with the law."

Then followed the case of Northern Pacific Ry. Co. *v.* Galvin, 85 Fed. 811, above quoted in full. With these decisions as a part of the law of the land, and constituting rules of property in the State of Washington, appellant's rights were acquired.

The next case in the Washington Supreme Court was that of Coolidge *v.* Pierce County, 28 Wash. 95. This was based upon the Act of 1897 and was decided in March, 1902, which was long after the case at bar was instituted. The decision was rendered in full view of the Baer and Vestal cases,—referred to them, cited them with approval, and reiterated the rule there laid down. The claim having been made in the Coolidge case that the name of the owner was necessary under the Act of 1897, and the court in passing upon that question said: "This was true under the revenue law prior to the enactment of the Statute of 1895. Under the *prior system* real property was assessed to the owner. The owner's name was an essential part of the description. It was in fact a material part of the notice given him of the tax charged against his real property and was so adjudged by this court." Citing the Vestal and Baer cases, and also citing and quoting from the Galvin case decided in the Circuit Court of the United States, and above quoted at length, where the *very act* in question here had been fully adjudicated upon the *very point* in question. The court declares

further "that the legislature in the enactment of the law of 1895, intended that the mention of the owner was not of the substance of the listing and entry upon the assessment roll."

It would seem that the foregoing authorities had effectually established the rule, and the Supreme Court of Washington was confidently appealed to, in the case at bar, which was the next in the series of cases by that court upon that point. See Woodward *v.* Taylor, 33 Wash. 1; also see Transcript, p. 194 *et seq*). The court reiterated the rule in the Baer, Vestal, and Coolidge cases, but declared that the latter case was in error in holding that the change in the manner of assessing and collecting taxes had taken place in 1895, whereas in fact it occurred in 1890; and overruled the Federal case (the Galvin case) in the following words: "The learned judge in that case assumed that the assessment was against *the person;* and that the name of the owner was necessary to a valid assessment by reason of the two decisions from this court above referred to"—(viz: the Baer and Vestal cases).

But evidently the language of the Federal judge was not fully considered by the Washington Court, because at the very outset he specifically states that, "The judgment is a judgment *in rem.*" It is quite evident, therefore, that the learned Federal judge fully understood the nature of the act which he was considering, that he did not carelessly assume that the assessment was against the *person*, and that he did not differ from the view which was subsequently taken by the Supreme Court of Washington, when it also declared that that proceeding was a proceeding *in rem.* The

only difference between the two courts seems to have been concerning the *nature* of a proceeding *in rem;* the one court holding that no notice is necessary, and the other court holding that it is. The Washington Court would take away from the appellant his right to *such notice* as the act *prescribed*, while the Federal Court expressly declares that *notice* is just as essential to a valid and binding proceeding *in rem*, as one *in personam*, and its absence robs the court of all jurisdiction to enter a valid decree against property.

In 1901 the revenue law of the State of Washington was again amended and provision was made for *general* service upon all persons, whether owners or not, and whether known or unknown, by making them co-defendants in one proceeding, and stating that "the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein. The names of the person or persons *appearing on the treasurer's rolls* as the owner or owners of said property for the purpose of this act shall be *considered and treated* as the owner or owners of said property; and if upon said treasurer's rolls it appears that the owner or owners of said property are *unknown*, then said property shall be proceeded against as belonging to an unknown owner or owners, as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of said proceedings and of any and all steps thereunder."

See Laws, Washington, 1901, p. 385, Sec. 3.

We have no issue to take with such a statute as this. It suffices to say that that it was passed long after the

rights of appellant accrued, and cannot affect them in the slightest degree. We only refer to it here for the purpose of presenting a consecutive history of the revenue legislation of Washington upon the right of *the owner* to notice in tax proceedings.

Even under such a statute its provisions must be *strictly complied with*. This has been held by the Supreme Court of Washington in the following cases and others referred to below

Spokane Falls Ry. Co. *v.* Abitz, 80 Pac. 192.

Carson *v.* Titlow, 80 Pac. 299.

Even under a statute so stringent as the one just quoted, the Supreme court said in Carson *v.* Titlow, *supra*, that the foreclosure proceedings must be against the *reputed* owner appearing on the tax rolls at the time the certificate is issued, and that the notice must issue to *such* person and to "each and every person having or claiming an interest in the premises sought to be sold." Thus distinctly recognizing the right of the *owner or claimant* of the property to have such notice as the statute provided he should have.

And this was said of a statute which unequivocally provides for a *proceeding in rem*. If, therefore, strict compliance with the requirements for notice to the owner were necessary under this statute, how much more should it be under the statute in force at the time appellant's property was assessed?

The Supreme Court of Washington again recognized the right of the *owner* to notice when it held, in Jefferson County *v.* First National Bank, 80 Pac. 449, that an assessment of bank stock, which the law required should be assessed in the *name of the owner*, was void

when assessed to the bank itself. The argument is used that the stockholders' rights are "prejudiced" by the omission. But why should the owner's rights be prejudiced in this case and not in the one complained of by appellant? The provision of the law is just as imperative in the one case as the other.

In Young *v.* Drooz, 80 Pac. (Wash.) 810, where the summons was held insufficient and the judgment entirely void, because it required the owner to appear "within 60 days after the service of this summons upon you," instead of "within 60 days from the date of the first publication of this summons," though the defendant had *full knowledge* of the proceedings, and actually *appeared at the sale* and bid on the property.

McManus *v.* Morgan, 80 Pac. (Wash.) 786, holds that service in a tax proceeding must be made strictly in accordance with the provisions of the statute. The court very properly says:

"It is universally held that, in *all* proceedings where notice is required, the *notice* PROVIDED BY STATUTE must be given, and if *such* notice is not given, the court acquires no jurisdiction."

In the case of *Anderson* v. *Turatti*, 81 Pac. 557, it would seem that the pendulum of the Washington Supreme Court had completely swung back to the just rule that where the statute has provided for notice to the owner, such provisions are mandatory and must be observed. The remarks of the court are quite remarkable, in view of the decision in the case at bar, especially when it is remembered that the decision is based upon the most drastic act ever enacted by the Legislature of Washington, for limiting the right of the owner to notice, viz, the Act of 1901 just referred

to, providing for general notice to "all persons interested," etc. The owner of the property was one Samuel Benn. Benn had conveyed the property to one Decker, but the deed had not been put of record (which is not so strong a point as in the case at bar, where the Woodwards were the owner as shown by the public records). The summons was directed to "Jacob Kraber and Mary Doe Kraber, his wife, and all persons unknown, if any, having or claiming to have any interest," etc. The Supreme Court in ruling upon this state of facts used the following forcible language, very pertinent to the case at bar:

"The summons not only omitted to include the name of the owner, as shown by the tax records, but the persons actually named therein were entire strangers to the title, having no interest in it whatever. The respondents, both by the complaint and the evidence, tendered the issue that the summons was so made, with the fraudulent intent of misleading the real owner; but we need not discuss that matter, inasmuch as we think the summons was insufficient without any actual fraudulent intention on the part of the appellants. The statute (See Laws 1901, p. 384, c. 178, § 1) *requires that the summons shall contain the name of the owner.* We said in Williams *v.* Pittock, 35 Wash., 271, that when the property has been assessed to an *unknown owner*, and when a certificate of delinquency has been so issued, the foreclosure may be had in form against an *unknown* owner as *actually mentioned* in the tax rolls and certificate of delinquency, may be omitted from the summons. But we did not say that the name of an owner, as actually mentioned in the tax rolls and certificate of delinquency may be omitted from the summons. Upon the contrary, as care was taken in the case to name in the summons the persons whose names appeared

upon the tax records as owners, we stated that good faith was exercised, and that no more was required by way of investigating the subject of ownership. We think the *name of the owner*, described in the tax rolls and certificate of delinquency, should be included in the summons, and that it is defective without it. Such omission may mislead, to the *prejudice* of *the owners*, as is claimed to have been true in this case. In the summons before us the name of the tax record owner was omitted and those of entire strangers to the title were inserted. It would have been difficult to prepare a summons more misleading in its terms. The court found that neither the tax record owner nor his grantees had any actual knowledge of the pendency of the foreclosure proceeding. The insertion of the name of the tax record owner would have brought at least constructive, if not actual knowledge to him, and his grantees would have been chargeable therewith. We think, therefore, that the court was without jurisdiction to render the foreclosure judgment, that the subsequent tax deed was issued without legal authority, and that the judgment in this action which cancelled the deed, was right."

This case undoubtedly puts the Supreme Court, for the present at least, in direct agreement with the Federal Circuit Court in the Galvin case (*supra*). Nearly every fact related here upon which the court based its ruling as above, will be found present in the case at bar. If the name of the owner had been "Woodward" instead of "Benn," and the name of the stranger to the title, "Winehill" instead of "Kraber," and if, instead of inserting Winehill's name in the rolls, the assessor had inserted "Name of owner unknown,"—the decision could well stand as a decision in the case at bar. And when it is remembered that this is said of an act which establishes

a proceeding *in rem* in the strongest sense, that what was said in the decision in the case at bar was said of an act having no exceptions to the provision that the name of the owner must be given, except when it was unknown—the decision seems most remarkable.

It is to be hoped that the Supreme Court of Washington has now found ground upon which it can stand consistently and with firmness. A decision by this court, as sought by appellant, will undoubtedly finally establish property rights in that State upon a foundation alike fair and just to the owner and the public.

A Rule of Property Established.

In view of the foregoing decisions was not the learned Federal Judge in the Galvin case justified in declaring that the rule that all property must be assessed in the name of the owner, was a *rule of property* in the State of Washington? It would not be disturbed by the mere fact that the legislature had changed the proceeding from a proceeding *in personam* to a proceeding *in rem*, could not do away with an established rule of property, unless ~~the legislature~~ had so declared in some unmistakable manner, as, for example, by taking away or changing the requirement that it should be assessed to the owner. But instead of changing the law in this respect it *re-enacted* it. In so doing it is presumed to have had in mind the rule itself.

III.

Was the Rule Changed After the Rights in Question Attached?

We come now to the last point contended for, namely, that this court will not be bound by a change of decision announced after the rights of the parties had attached.

We invoke the authority of this court as announced in Douglas *v.* Pike, 101 U. S. 667, and cases there cited, where it is said that—

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a *change of decision* is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment.

* * * "We recognize fully not only the right of a State court, but its duty to change its decisions, whenever in its judgment the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, *except so far as they affect rights vested before the change was made.* * * * We always regret to find ourselves in conflict with the courts of the States in matters affecting local law, but when necessary we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction."

The rights of appellant in error were all acquired under the rule announced by the Supreme Court of Washington and followed by the Federal court in the Galvin case, *before* the change of decision; for it must be remembered that the change was made first in the case at bar; that up to that time the rule was uniform and unquestioned.

In Smith *v.* McDonald, 42 Cal. 487, the Supreme Court of California well stated the rule thus:

"When a rule by which the title to real property has been determined has become established by positive law or by deliberate judicial decision, its inherent correctness, or incorrectness its justice or injustice, are of far less importance than that it should itself be constant and invariable."

The Questions Presented by the Facts as Shown by the Record in Case at Bar.

Having now cleared the case at bar of all the preliminary questions affecting the jurisdiction of this court, and having submitted the status of the local authorities, we are prepared to discuss the facts as shown by the record upon their merits.

The Provisions of the Statute for Listing the Property.

The Supreme Court of Washington, in its opinion in this case, after reviewing the various statutes of Washington concerning the revenue, pointed out the statutes in question here, under which the assessment was made. We quote its language as follows, to wit:

"It will thus be seen that there has been no material change since the act of 1890, in the manner of listing, assessing or collecting taxes on real property in this State. The *essential provision* for listing and assessing real estate has been maintained in the acts of 1893 and 1895, substantially as it was in 1890, viz.: 'The assessor shall make out in the real property assessment book, in numerical order, complete lists of all lands or lots subject to taxation, showing the *names of the owners*, if to him

known, and if unknown so stated opposite each tract or lot, in pencil memorandum, the number of acres and the lots or parts of lots, or blocks, included in each description of property.' "

See also—

Laws Washington, 1889–90, p. 530, Sec. 49.

Laws Washington, 1891, p. 297, Sec. 45.

Laws Washington, 1893, p. 341, Sec. 45.

I.

Manner of Compliance with the Statute Concerning Notice to the Owners.

(a) Notice of the Assessment.

How was this provision complied with in making the assessment? The testimony appears on page 107 of the Transcript, and we give the same here, for convenience, in tabulated form, as follows:

Name of owner.	Number of lot.	Number of block.	Name of plat.	Value, etc.
C. Winehill.....	8	11	Maynard's Plat.	$34.000

The foregoing shows all the material facts concerning the *assessment* for consideration here, as they appear in the record. It will be seen at a glance that the statute has not been complied with. The name of the owner is given as "C. Winehill" whereas, in fact, H. S. Woodward and Sarah Woodward, his wife, were the

owners. That they were the owners is not in dispute here.

See par. IV of Complaint, Trans., p. 38.
See par. II of Answer, Trans., p. 70.
See recorded deed, Trans., p. 134.

b. NOTICE OF THE SALE.

The foreclosure proceedings were instituted and carried on under the act of 1893. The provisions applicable thereto are as follows.:

"The county treasurer shall transcribe into a book prepared for the purpose, and known as the tax judgment, sale, and forfeiture record, the list of deliquent lands or lots which shall be made out in numerical order, and which shall contain all the information necessary to be recorded, at least five days before the commencement of the term at which application for judgment is to be made, which book shall set forth the *name of the owner*, if known, the proper description of the land or lot, the year or years for which the taxes or assessments are due," etc.

See Laws Wash., 1893, p. 369, Sec. 101.

Again referring to the record we tabulate the material evidence, as follows. (See Trans, p. 111.).

Name of owner.	Number of lot.	Number of block.	Name of plat.	Value, etc.
C. Winchill.....	8	11	Maynard's Plat.	$31.500

Again, it will be seen the name "Woodward" does not appear in the rolls. The name "Winehill" to

whom the property was *assessed* as the owner, is here rendered "Winchill," but whatever may be the effect of this difference it is clear that notice to "Winehill" or "Winchill" is not notice to "Woodward." Whoever "Winehill" or "Winchill" may be, it is conceded that he was not the *owner* of the property, and that the Woodward's were; and therefore the assessment is absolutely void *ab initio*.

(*c*) NOTICE OF THE EXPIRATION OF THE PERIOD OF REDEMPTION.

Even if there were any question concerning our position with reference to (1) the assessment and (2) the sale, then we submit, there cannot be the slightest question concerning (3) the absolute want of notice of the expiration of the period of redemption. We have already discussed this question at length in the argument upon the motion to dismiss (see pages 20 to 28); but it is such an important one and so absolutely decisive of this case, so far as appellant's rights are concerned, that, for the convenience of the court and for the better understanding of the facts in issue here we deem it our duty to here set out in greater detail, the facts and the law applicable thereto.

1. PROVISION OF THE STATUTES FOR REDEMPTION BY THE OWNER.

The statutes of Washington contain extensive provisions, imposing upon the applicant for a tax deed the duty to give *notice* of his intention to apply therefor. This statute has already been set out in argument upon the motion to dismiss and affirm, but for convenience we again set it out here. It reads as follows:

"Hereafter no purchaser, or assignee of such purchaser, of any land, town or city lot, at any sale of lands or lots for taxes or assessments, penalties, interest and costs, due either to the State or county, shall be entitled to a deed for lands or lots so purchased, *until the following conditions have been complied with*, to wit: Such purchaser, or assignee, shall serve or cause to be served a written or printed or partly written and partly printed notice of such purchase, on *every person in actual possession or occupancy* of such land or lot; also the person in *whose name the same was assessed* or taxed, if upon diligent inquiry he, or she, can be found in the county; also the *owners of and parties interested* in said land or lot, if they can, upon diligent inquiry, be found in the county, at least three months before the expiration of the time of redemption on such sale; in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed, or specially assessed, and when the time of redemption will expire. If no person is in possession or occupancy of such land or lot, and the person in whose name the same was taxed or assessed, upon diligent inquiry cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper of general circulation in said county, in which said land or lot is situated, which notice shall be inserted three times—the first time not more than three months and the last time not more than one month before the time of redemption shall expire: Provided, however, that if the owners of said land or lots, or the parties interested therein, cannot be found in the county, and the person in actual occupancy is tenant to or is in possession under the owner or party interested therein, then service of said notice upon such tenant shall be deemed service upon the owner or party interested: And provided further, that if the owners, or parties interested are unknown to such purchaser or his assignee, then said publication, as to them, may be to the unknown owner or parties interested."

Laws Wash., 1893, p. 380, Sec. 127.

This provision is followed by another, specifying the manner of making the *proof* of compliance therewith, which reads as follows:

"Every such purchaser or assignee, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of the foregoing section *stating particularly* the facts relied on as such compliance, which affidavit shall be delivered to the county treasurer, and which shall by him be filed and carefully preserved with the records of his office, and which record or affidavit shall be *prima facie* evidence that such notice has been given."

See Laws Wash. 1893, p. 380, Sec. 128.

These two statutes were copied almost verbatim from the Statutes of Illinois.

See Starr and Curtis, Codes Illinois, Vol. 3, p. 3487, Sec. 218, and p. 3490, Sec. 219.

They were originally enacted by the Legislature of Washington, in similar form, in 1885.

See Laws Wash. 1885–'86, p. 92.

2. General Rules Applicable to Redemption Statutes.

The general rules applicable to statutes requiring notice to redeem are fully laid down and discussed at 27 Ency. Law (New Ed.) p. 860–865. And it is apparently universally held, that the requirements of the statutes in such cases, must be strictly observed as a condition *precedent* to the right to demand a deed The notice must be precise and full. It must be

addressed to the proper person. The *name of the owner* must be given. If the property is occupied, that fact must be *stated*, and *all* the persons in possession or occupancy when the notice was served must be *named* in the affidavit.

Judge Cooley in his work on Taxation at p. 532 says:

"Whatever the statute may make provision for, *subsequent to the sale*, in order to the protection of the interest of the parties having the right to redeem must be strictly performed. The reasons which require this are the same that render imperative a strict compliance with all those provisions which are to be observed in the interest of the tax-payer *before the sale* is made. One of the most usual requirements is the publication of a notice to the tax-payer, with perhaps in addition a personal service upon the owner in case he is known and is a resident. *Every provision of this nature must be strictly complied with.* Nothing can be substituted for it by the officers; *the right to it cannot be waived by one who chances to be in possession of the land*, but who has no interest in it and the owner may rely on his right to it and wait until he receives it before taking proceedings to redeem."

And the following authorities are particularly in point:

Black Tax Titles, 348, 350 (2d ed.).
Cessey *v.* Cornell, 27 N. W. (Iowa), 365.
Weaton *v.* Knight, 16 N. W., 532.
Arthur *v.* Smathers, 38 Pa. St., 40.
Doughty *v.* Hope, 3 Denio, 594.

Dentler *v.* State, 4 Blacf., 258.
Hartley *v.* Boynton, 17 Fed., 873.
Walsh *v.* Burke, 134 Cal., 594.
Miller *v.* Williams, 135 Cal., 183.

3. Adjudications of the Local Statutes by Circuit Courts of Appeals and State Supreme Court.—Illinois Decisions Followed.

But in the case at bar it is not necessary to rely upon *general* rules—though we might do so with perfect security.

These statutes have already been very extensively adjudicated by the courts of the State of Illinois, where every question presented by this appeal has been decided as contended for by plaintiff in error. We might rest upon these decisions as forming unquestioned authority here upon the theory that the Legislature of the State of Washington had them in mind when they adopted the statutes. But we are not required to do this, for the Circuit Court of Appeals for the Ninth Circuit, has expressly followed the Illinois decisions in passing upon the Washington statute, and the Supreme Court of Washington has itself adopted the construction of the Circuit Court of Appeals.

The Illinois decisions having thus been recognized and adopted in so many ways we shall discuss them at length, in this brief, as forming the correct guide for this Court in passing upon the questions presented by the case at bar.

Furthermore this court itself has adopted the same rule in the case of Gage *v.* Bani, 141 U. S., 344.

The decision by the Circuit Court of Appeals for the Ninth Circuit, just referred to is

Coulter *v.* Stafford, 56 Fed., 564.

The court quotes the provisions of the statute, and says: "Compliance with the provisions of the law in this respect is an essential requisite, as a *condition precedent* to authorize the sheriff to make this deed. The notice must be given and the affidavit of the service must be filed. * * * The sheriff was not authorized to execute the deed unless the affidavit as to the service had been made, presented and filed as the law provides. * * * The statute must always be examined in order to ascertain the authority of the officer to execute the deed."

This decision was adopted and followed by the Supreme Court of Washington, and the language above quoted expressly approved in the case of—

Herrick *v.* Neiz, 16 Wash. 74.

Among the authorities cited by the Circuit Court of Appeals to sustain the views expressed (and adopted by the Supreme Court of Washington) was the case in this Court just cited, viz.:

Gage *v.* Bani, 141 U. S. 344.

The point relied upon to sustain the insufficiency of the affidavit in the Gage case was comparatively inconsequential. The affidavit stated that the purchaser had bought the lands "at a sale of lots and lands for taxes *and* special assessments," etc. Referring to this omission this court, through Mr. Justice Harlan, said:

"It is plain, upon the face of the statute, that a purchaser at a sale for taxes or special assessment is not entitled to a deed *until* the conditions prescribed by Section 216 are met."

And again:

"So it must appear that the purchaser at the tax sale, or his assignee, made the affidavit required by Section 217 as to the service of notice of the tax sale. Smith *v.* Hutchinson, 108 Illinois, 662, 667; Gage *v.* Caraher, 125 Illinois, 447, 454. And when the notice is produced the question is necessarily open as to whether it was such as Section 216 prescribed, *before* the purchaser is entitled to a deed from the county clerk. * * * It is firmly settled that the giving of the particular notice required is an *indispensable condition precedent* to the right to make a deed to the purchaser or assignee. Gage *v.* Bailey, 100 Illinois, 530, 536; Gage *v.* Schmidt, 104 Illinois, 106, 109; Gage *v.* Hervey, 111 Illinois, 305, 308; Gage *v.* Mayer, 117 Illinois, 632, 636. As the notice of the sale was not in conformity with the statute Gage was not entitled to the deed of July 24, 1876, and it is void."

We call particular attention to the case just referred to because from the many points discussed it is, in fact, a decision of the case at bar. We shall refer to it further in discussing the next point. We conclude the discussion of this point with the following quotation from the case of Gage *v.* Mayer, 117 Illinois, 632, above cited by this court. It is there said:

"The execution of the deed rests entirely upon the *sufficiency* of the affidavit filed with the clerk, upon which it was issued. Parol evidence cannot be introduced to supply defects or omissions in the affidavit. The statute only authorizes a deed to be created upon an affidavit being filed which contains certain *specified facts*. If the affidavit does not contain the specified

facts the deed is unauthorized and nugatory, *regardless* of the *real* facts may be or what may be proved."

4. Contents of the Affidavit in the Case at Bar.

The affidavit which was filed with the treasurer in the case at bar to show compliance with this statute reads as follows: (See Transcript, p. 128.)

"J. W. McConnaughey, being first duly sworn, on oath deposes and says: that he is the agent of H. C. Taylor, the person whose name is subscribed to the notice of application for tax deed, a copy of which is hereto attached; that he has made careful and diligent search and inquiry for the person in whose name the lot in said notice described was taxed, and finds the same to have been taxed to C. Winchell, and for the owners of and persons interested in said lot, viz.: Gustave Winehill and Mattie Ford, who are named in said notice and to whom said notice is addressed, and that said persons cannot be found in said county of King, State of Washington; that he published the original notice, of which the attached is a true copy in *The Argus*, a newspaper of general circulation in said county of King, in which the land in said notice described is situated; that said notice was inserted three times in three regular and separate editions of said newspaper, the date of the first insertion and publication being on the 2d day of January, 1897; the date of the second insertion and publication being on the 9th day of January, 1897, and the date of the last publication being on the 16th day of January, 1897; the first publication being not more than three months and the last not more than one month

month prior to the date of the expiration of the time of redemption of said property from tax sale.

J. W. McCONNAUGHEY."

It will be apparent from a most cursory and indifferent examination of this affidavit that it fails to show a compliance with the statute in the following particulars:

I.

SERVICE ON PERSONS IN POSSESSION OR OCCUPANCY.

The affidavit fails to show service upon "*every* person in actual possession or occupancy"; in fact, it fails to show service upon *any* such person. It says nothing whatever about "persons in possession or occupancy."

It must be remembered that the record in this case shows that there were several persons in possession and occupancy of the premises in controversy.

See Transcript, pp. 129–133.

It appears therefrom that so-called "Notices" were served upon L. Gemechi, H. Freedman, Oscar Knox, A. Lombardini, and Benj. Greenberg, each of whom is described in the "notice" "as the person in actual possession and occupancy."

Now, the *affidavit* says nothing about these persons. It does not mention any persons as being in possession or occupancy, notwithstanding the fact that these "notices" were served by the same person who makes the affidavit. The statute is specific and positive. It says *every* person in possession or occupancy must be served with notice.

The omission is declared to be fatal by all the authorities. (1) The fact that the property was occupied must be shown in *the affidavit*. (2) The names of the the persons on whom service was made must be stated in the affidavit. (3) The persons named must be shown to be the *only* persons in possession or occupancy, and (4) such possession must appear to have been an existing fact as of the very date of service.

The defendant in error, fully realizing the effect of this omission, sought to correct it by evidence *aliunde*, by which it appears that there were other tenants and persons in possession or occupancy:

See Trans. p. 105.

None of these facts appear in the affidavit here. We cite:

Wisner *v.* Chamberlain, 117 Ill., p. 568.

In that case the affidavit was much more complete than the one involved in the case at bar, for there was an attempt to make a showing of service upon persons in possession or occupancy, while here there was no mention of the subject. In the Wisner case the affidavit recited that the South Park Commissioners were in possession of the tract on the 19th of April, 1881, and that copy of the notice was served on them on the 20th. Because of this discrepancy of one day, and because it did not appear that the Commissioners were in possession on the very day of service, the court declared the affidavit insufficient and the tax title based upon it, void. Nor would the court permit evidence *aliunde* to show that the Commissioners were in fact in possession and occupancy of the property on the 20th, saying; "The statute is express that the pur-

chaser or his assignee, by himself or agent, shall make an affidavit of having complied with the provisions of the section, *stating particularly the facts relied on* to show such compliance, *before* he shall be entitled to a deed. Such affidavit was not made and the purchaser had no right to a deed. We cannot go so far to sustain a tax title as to dispense with a *condition precedent* to it." And again, in answer to the plea that no one could be injured by slight errors in the affidavit, the court said: "The title to be made under a tax deed is one *stricti juris*, and we need look no further, where there has been a non-compliance with what the law makes a *condition precedent* to the right to have a tax deed."

See also Stilwell *v.* Brammell, 124 Ill., 338.

II.

Service upon the Owners.

The affidavit fails to show any service or attempt at service upon Sarah Woodward and the estate of Henry S. Woodward, deceased. The affidavit does not mention either of them as having anything to do with the property. On the other hand it describes two entirely different persons as the owners. It says that "*search and inquiry*" was made "for the *owners* of and persons interested in said lot, viz: *Gustave Winehill* and *Mattie Ford.*" It further states "that *said* persons cannot be found in said county of King, State of Washington." Therefore, it states that the original notice was published.

It must not be forgotten that it is admitted (as already shown) all the way through the proceedings in this case, the Woodwards were the owners of this prop-

erty at all the times mentioned, and that the defendants knew this. It would not be material were it otherwise, because the statute makes it incumbent upon the tax purchaser to find out who the real owner is, and to serve the right party with notice, at his peril. But it adds to the moral strength of appellant's cause that the defendants actually knew who the owners were and deliberately disregarded their rights.

This point has been well adjudicated in Illinois.

See Harding *v.* Brophy, 133 Ill., 39.
Smith *v.* Prall, *Ibid.*, 308.
Stillwell *v.* Brammell, 124 Ill., 338.

The first case here cited is peculiarly applicable to the case at bar, because there, as here, the ownership partly belonged to an *estate* of a deceased person. We quote: "The plaintiff by stating that he was unable to find the names of any of said owners, except the estate of D. L. Gregg, and two other persons, thereby impliedly asserts that the estate of D. L. Gregg was one of the owners. Thereupon, he was required to serve the notice upon the *representatives* of the estate of D. L. Gregg, if they could upon diligent inquiry be found in the county. There is no affidavit or other evidence to show that the representatives of that estate were personally served with notice. * * * It is true that the affidavits show the publication in a newspaper of a notice addressed to the estate of D. L. Gregg. But such publication is only made necessary, and can only be regarded as a substitute for personal service, when the owner cannot upon diligent inquiry, be found in the county."

An attempt was made by the defendants to show that they had served Mrs. Woodward's agent in Seattle, and, indeed, the Supreme Court of Washington seemed to be influenced by this attempted showing into the conclusion alluded to above. It is pertinent to inquire where is the statutory provision which authorized the notice to be served upon an agent. The claim is based upon the fact that Oscar Knox was Mrs. Woodward's personal agent in Seattle, and that the defendants served him with the "notice" appearing on page 131 of the Transcript. This notice is itself a refutation of the theory that Knox was served as Mrs. Woodward's agent, for it reads exactly like all the other notices on pages 130 to 133. It says: "You as the person in *actual possession and occupancy.*" It does not read: "You, as the agent of Mrs. Woodward."

But even if it did so read, and was intended to be served upon Knox as agent of Mrs. Woodward, it would have been entirely without force or effect as *notice* to her, for the incontestable reason that the statute does not authorize such a method of service. This has been squarely decided in Illinois in the case of Gage *v.* Waterman, 121 Ill., 115.

In that case one J. Young Scammon was the owner of the property. The notice was handed to Mr. Bogue whom the court describes as "the legal agent of Scammon." The court declares the service ineffective, as notice to Scammon.

The case of Esker *v.* Heffeman, 159 Ill., 38, is one of the latest decisions by the Illinois Court on this subject; the court says: "The affidavit in the record in this case shows personal service on Dennis McMahon

the actual occupant and the only person in possession of the land, and also upon George Foster, agent of the owner, and also the non-residence of William Foster, the owner and the person in whose name the land was assessed. * * * The affidavit does not state that Dennis McMahon or George Foster was tenant to or in possession *under* William Foster. An attempt was made to supply this discrepancy by oral proof upon the trial of the case." This was also attempted in the case at bar, as will be seen from the record at page 105 of the Transcript. The defendants clearly recognized the insufficiency of their record and of the facts required to be stated in their affidavit and sought by this means to cure the defects. In the case just referred to the court continuing its remarks quotes the language of Gage *v.* Mayer, 117 Ill., p. 632, where it was said:

"The execution of the deed rests *entirely* upon the *sufficiency* of the affidavit filed with the clerk, upon which it was issued. *Parol evidence cannot be introduced to supply defects or omissions in the affidavit.* The statute only authorizes a deed to be executed upon an affiidavit being filed which contains certain specified facts. If the affidavit does not contain the specified facts the deed in unauthorized and nugatory, *regardless of what the real facts may be* or what may be proved."

This rule is also supported in unequivocal language by:

Miller *v.* Pence, 132 Ill., 149.
Hughes *v.* Carne, 135 Ill., 519.
Perry *v.* Bowman, 151 Ill., 25.
Wisner *v.* Chamberlin, 177 Ill., 568.

III.

The Mode and Manner of Service.

The law requires that the *mode* of service and the facts relied upon as showing service, shall be stated in the affidavit. See

Davis *v.* Gosnell, 113 Ill. 121.
Price *v.* England, 109 Ill. 395.
Gage *v.* Hervey, 111 Ill. 305.

In the former case it was said:

"It is a fatal defect in the affidavit, and consequently to the validity of the tax deed, that the affidavit fails to show the mode of service—does not state particularly the facts relied on as constituting service, so that the court may see that the service was such as required by law."

The affidavit in the case at bar recites that "careful and diligent search and inquiry" was made for the following persons, viz.: C. Winchell, Gustave Winehill, and Mattie Ford. These are the only persons mentioned in the affidavit for any purpose, the former being designated as the person to whom the property was taxed, and the two latter as "the owners and persons interested." No mention is made of any *service* upon either of these parties, for they all were said to be absent from the county, and *because* they were absent from the county that a notice was published. No mention is made of Freedman, or Lombardini, or Benjamin Greenberg, or Oscar Knox, all of whom appear to have been served with alleged "notices" as "persons in possession or occupancy." If the affidavit had stated that these

last-named persons had been served as "persons in possession and occupancy," the statute would to that extent have been complied with. It would have shown *service* upon somebody for some purpose. But as it was filed with the treasurer it contained no reference to any kind of *service* upon any person whatsoever, except the service by publication.

Was, therefore, service by publication authorized upon the showing made in the affidavit? Clearly it was not. Before service by publication could be had it should have been made to appear—

1. That "no person is in possession or occupancy of such land or lot," and

2. That "the person in whose name the same was taxed or assessed, upon diligent inquiry cannot be found in the county." (See statute.)

These two facts must co-exist. The word "and" is used as a conjunctive. Now the affidavit does not recite either of these facts as a condition. It is only by reference to other data that we can gain any information concerning the subject, and this the law does not permit, for the affidavit *must* be complete in itself. The affidavit says that "Gustave Winehill and Mattie Ford" cannot be found in the county. But they are described in the affidavit as the *owners* and *persons interested*, not as the persons "in possession or occupancy."

"Nor was "C. Winchell" the person in whose name the lot was taxed. By reference to the tabulated statement at page 24 *supra*, it will be seen that the land was assessed to one "C. Winehill." Therefore, the state-

ment in the affidavit that search was made for "C. Winchell" furnished no proof that "C. Winehill" who was the only person for whom search should have been made under the provisions of the statute, was intended to be served.

Judge Cooley (see Taxation, p. 483), says:

"The notice is bad if it differs from the assessment in giving the *name of the person* to whom the land is taxed; or if it fails to give the name of the person taxed when the statute requires it."

This court held in Marx *v.* Hanthorn, 148 U. S. 172, that notice to "Hawthorne" was not notice to "Hanthorn."

A sale of land at a tax sale as the property of Daniel "Tragar," where Daniel "Troyer" was the owner, was held void, though the error arose from a mistake in the deed by which Troyer acquired his title to the property. (See Troyer *v.* Wood, 10 S. W. (Mo.), 42.) So, a sale of land belonging to "Millen" was void, where the notice was addressed to "Miller." (See Chamberlain *v.* Blodgett, 10 S. W. (Mo.), 44). Again, a sale of land which belonged to "Castro" was held void where the assessment was made to "Castero." (See Emeric *v.* Alvarado, 90 Cal., 444.)

In the case of Gage *v.*, Hervey, 111 Ill., 305, the affidavit stated that the property was "assessed in the names of Robert Hervey and Robert Henry," and the affidavit stated that he had served a notice "on said Robert Hervey and Robert Henry" by serving "Robert Hervey personally." It is quite apparent that a mistake was made somewhere during the proceedings, and that "Hervey" was thus rendered

"Henry"; just as it may be possible that, in the case at bar, "Winehill," "Winchill," and "Winchell," may be one and the same person.

But the fact remains that the property was assessed to "Winehill," that *judgment* was taken against "Winchill," and that, according to the affidavit, *notice* of *redemption* was given to "Winchell," as the party in whose name the property was *assessed*. In answer to the suggestion that "Harvey" and "Henry" were the same person, the court stated, "that the record contains no evidence such is the fact. The affidavits both declare the property was taxed or specially assessed in the names of Robert Hervey and Robert Henry. This would seem to imply that Robert Henry is a real person other than Robert Hervey."

The foregoing authorities conclusively establish the necessity of accuracy in following the provisions of the statute, even to the extent of a single letter, and that all these facts must *correctly* appear in the affidavit which is submitted to the treasurer as his *sole* authority to issue the tax deed. It is not important what the fact may be in a single case, but it is important that the rights of all parties be fully preserved. Facts are never presumed in aid of notice.

Respectfully submitted,

TWYMAN O. ABBOTT,

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 57, October Term, 1908.

(Docket 21,[illegible])

HENRY FRENCH, Plaintiff in Error,

vs.

H. C. TAYLOR and LIDA R. TAYLOR, His Wife; J. W. McCONNAUGHEY, D. F. McCONNAUGHEY and C. K. McCONNAUGHEY, Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF OF PLAINTIFF IN ERROR ON MERITS.

TYLMAN O. ABBOTT,
Attorney for Plaintiff in Error.

Post-office Address,
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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 57, October Term, 1905.

(No. 309, October Term, 1904.)

HENRY FRENCH, PLAINTIFF IN ERROR,

vs.

H. C. TAYLOR AND LIDA R. TAYLOR, HIS WIFE; J. W. McCONNAUGHEY, D. F. McCONNAUGHEY, AND C. K. McCONNAUGHEY, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Reply to Additional Argument of Defendants in Error on the Motion to Dismiss.

In the final brief of defendants in error many additional points and authorities are suggested for the purpose of showing that this court is without jurisdiction to entertain this appeal.

The principal argument seems to be now directed to the *manner* in which the Federal question was raised. The brief, as well as the oral argument, proceeds upon the theory that because the *record* does not in terms show the exact

places and *times* where and when the Federal question was *discussed*, therefore no such question was ever raised or presented to the State court.

At the time of the oral argument we had no opportunity to examine the brief of counsel for defendants in error, because it had only a few moments before been filed with the clerk. Hence we were not prepared to point out their inconsistent position regarding this question. At that argument counsel reiterated that the Federal question was never called to the attention of the State court, and that the *claim* was never made except in the *complaint*. Upon examination of the brief, however, we find that it is *admitted* that a similiar statement made in the original motion to dismiss was erroneous. (See Defendants' Reply Brief, p. 6.) Counsel say: "We certainly used an erroneous expression when we said, 'Nowhere in the record, and never at any time, either in oral argument, written argument, brief, assignment of error, or otherwise, was this question ever suggested until the writ of error was sued out to this court.'" They explain that they meant by this that the Federal question was not *properly* raised.

But, notwithstanding this practical admission that the question was *presented* to the State court, it is urged that the question cannot be first *raised* in the petition for rehearing as though that were the point in issue.

But plaintiff in error has never contended that the Federal *claim* was *first* made, or in fact made at all, in the petition for rehearing; that is a mere fiction of the defendants' counsel. That it is was discussed and presented in the petition for rehearing, as it was at all other appropriate times, does not admit of any doubt. But the Federal *claim* was first made in the *complaint*.

That this is sufficient to support the *claim* is unquestionably sustained by this court in the cases cited at page 8 of plaintiff's argument upon the motion to dismiss. It is *conceded* by the *defendants* in error that the case of Bellingham

Bay *vs.* City of Whatcom, 172 U. S., 314, there cited, is against their contention; but in order to avoid its effect they assert that it is not *correctly* decided, being in conflict with many other decisions, but not pointing them out. (See defendants' argument in on motion to dismiss, p. 15.) The opinion in that case was written by Mr. Justice Brewer, and was evidently fully considered in all its bearings. In the opening paragraph he says: "By its *answer* the defendant raised a Federal question, inasmuch as it is alleged that the *notice* of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law and in conflict with the terms of the fourteenth amendment to the Constitution. This court, therefore, has jurisdiction of the case."

In Abbott *vs.* Tacoma Bank of Commerce, 175, U. S., 409, the *only* method by which the Federal question was *raised* was in the *complaint*, where the plaintiff stated that "any attempt to deprive him of his rights or his property by any process therein or thereunder is contrary to and in violation of the constitution and laws of the State of Washington and of section 1 of article XIV of the amendments to the Constitution of the United States." A motion to dismiss was made, as here, upon the ground that the Federal question was not properly set up, and it was held, Mr. Justice Harlan writing the opinion, that "this court has jurisdiction under the clause of section 709, 'or where any right title, privilege, or immunity is *claimed*, under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is *against* the title, right, privilege, or immunity specially set up or *claimed* by either party or authority.'" It is then stated that inasmuch as "the plaintiff did specially set up and claim" the protection of that statute, this court would take jurisdiction. It was not shown that the *claim* was made or set up anywhere except in the *complaint*.

Compare the language of the *claim* made in the case just cited with the language of the claim in the case at bar, as follows (see Transcript, p. 46, subd. 11, at bottom of page):

"That all the proceedings in this paragraph hereinbefore enumerated was and were in violation of the article V, and the first section of article XIV of the amendments to the Constitution of the United States, and of section III of article I of the constitution of the State of Washington, in this: that they constituted an attempt to deprive plaintiffs of their property without due process of law."

It is not possible to distinguish the *claim* in these two cases from the claim in the case at bar, and if it was sufficient in those cases to support the jurisdiction of this court it is sufficient in this.

Counsel for defendants in error seek to confuse the facts by asserting that plaintiff in error relies upon the *claim* as being first set up and made in the petition for rehearing, and much argument is offered to the effect that such a claim cannot be so made. This is merely a "straw man," however, and is built up for the purpose of diverting the attention of this court from the real facts. Plaintiff in error is standing upon no such foundation. He has not sought to sustain the jurisdiction of this court upon any such pretext.

The position of counsel for defendants is very inconsistent and difficult to understand with respect to the petition for rehearing. On page 7 of their brief they take the position that the petition cannot be considered by this court because it is not in the record of this case. They say they "search the record in vain to find it," and that, therefore, any references to that petition by the plaintiff are improper and cannot be considered. Notwithstanding this they pretend to set out excerpts from that petition, and to specify the points of error relied upon in the petition, and to base an argument covering many pages of their brief on the supposed insufficiency of the petition to give this court jurisdiction.

If the petition for rehearing is not in the record for the plaintiff in error, it is not in the record for the defendants in error.

It is proper, however, to state in answer to any possible question which might arise in the mind of the court, and to explain the absence of petition from the record, that under the rules and practice of the supreme court of Washington a rehearing is a very informal proceeding. There is no such thing as a *formal* petition, such as is known in some jurisdictions. All that is necessary is to file a typewritten statement of the reasons why the decision of the court is erroneous, which is considered by the court as an *ex parte* suggestion merely. It is not served upon opposing counsel. It does not become a part of the record of the case. If the court deems the suggestions worthy of notice the opposing party is notified and a time is set for a *rehearing*—that is, for a complete reargument. There are no rules of court prescribing how this petition shall be prepared, nor how the alleged errors shall be called to the attention of the court.

This brings us to the answer which was made by counsel for defendants at the oral argument to a question propounded by Mr. Justice White, concerning whether the rule of the State supreme court with respect to motions for rehearing was brought up in the record. The response of counsel was in the affirmative, he stating that it was set out in defendants' brief with the "addenda."

Upon reference to the addenda it will be observed that this response was entirely incorrect and misleading. No such rule is brought up in the record and none is cited in the brief. By referring to the "addenda" we find rule 12 of the supreme court of Washington set out. But this rule relates entirely to the preparation of a *brief*, not a motion for rehearing. A brief under the rule is a very formal paper. It must be printed and fifteen copies filed with the clerk. It must be served upon the opposing counsel.

The rule covering motions for rehearing is No. XIII, and reads in full as follows (see 25 Wash. Reports, at p. XXII):

"1. Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for a rehearing of the same question shall be filed: *Provided*, That the court may, in its discretion, allow any petition to be amended. The filing of a petition for a rehearing shall suspend the decision of the court until a ruling thereon.

"2. One typewritten copy of the petition for rehearing, filed with the clerk, shall be sufficient.

"3. When a decision is rendered upon a petition for rehearing, the clerk shall promptly notify counsel for the respective parties."

THE STATE SUPREME COURT HAS ITSELF ADMITTED THAT THE FEDERAL QUESTION WAS DULY PRESENTED AND CONSIDERED.

But, while the State supreme court does not *in terms* refer to the Federal question *in its opinion*, it does do so in the *record*.

By reference to the petition for a writ of error, at page 144 of the transcript, it will be seen that it is alleged in paragraph IV thereof—

"That the plaintiff in error (and his predecessors) has *in all the proceedings in this action*, specially set up and claimed the rights, title and privileges guaranteed by section one of article fourteen of the amendments to the Constitution of the United States, and the decision of the said supreme court in the order and judgment aforesaid, was against the validity of said claim—all of which more fully appears from the assignment of errors which is filed with this petition."

This petition is allowed and endorsed by the Chief Justice, and it constitutes a distinct admission that the Federal question was set up "in *all the proceedings*." To show that that

court did not act carelessly we direct attention to the order of the court allowing the writ, found at page 146 of the record, where the Chief Justice, over his own signature, states that he has made an *examination* of the petition and of *the record* in said matter, and, desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record, it is ordered that a writ of error be allowed.

Certainly enough has now been said concerning the manner of raising and presenting the Federal *claim*. Whether the exhibit which is on file with the clerk and which consists of an affidavit of plaintiff's counsel in opposition to the statements of defendants' counsel is proper to be examined or considered by the court we do not care to discuss.

By admitting that the statement made in their argument upon the motion to dismiss (which this exhibit was designed to controvert) was erroneous, the purpose of filing the exhibit has become unimportant.

Reply to Defendants' Brief on the Merits.

It will be unnecessary to reply to argument of defendants in error at any great length, since the argument set out in plaintiff's brief on the merits seems to cover the points.

That portion of the brief as well as of the oral argument submitted by counsel for the defendants making personal reflections upon the counsel for plaintiff in error and relating to the other causes of action mentioned in the complaint does not require any further notice than simply to remind the court that there is no evidence anywhere in the record to support a single statement concerning any other issue between the parties besides the question of the tax title. All such reflections and statements are made for the purpose of prejudicing the mind of the court against the good faith of

the plaintiff and his counsel, and is trifling with the dignity of this court.

The very discourteous, unwarranted, and unprofessional language which is used at pages 31 to 33 of defendants' brief in taking issue with our statement as to the meaning and effect of the decisions of the Washington court in the Baer, Vestal, and Coolidge cases, and of the United States circuit court and circuit court of appeals in the Galvin and Coulter cases is best answered by those cases themselves.

We proceed, therefore, to review the authorities cited.

Decisions Cited as Authority to Deny Plaintiff a Review of the Decision of the State Court.

Many decisions are cited by defendants in error, some of them many times, as being conclusive against a review by this court of the decision of the State supreme court.

One of these is Merchants' Bank *vs.* Pennsylvania, 167 U. S., 461. But this case merely lays down the rule that the decision of a State court to the effect that a State *statute* was not in conflict with the *State* constitution was conclusive upon this court.

Another case, Layton *vs.* Missouri, 187 U. S., 356, was to the same effect. The only question there involved was whether the decision of the State court that a State statute was constitutional when tested by the State constitution was reviewable by the court.

The case of Leigh *vs.* Green, 193 U. S., 79, is considered and distinguished by us at pages 19–20 of plaintiff's argument upon the motion to dismiss.

The opinion in that case was written by Mr. Justice Day, and, in view of his request made at the oral argument to have the distinction between that case and the case at bar pointed out, we have made a further examination of the case. In addition to the distinction already noted in our former brief, we observe that the question was, as stated by

the court, this: "Is the Nebraska *statute* under which the sale was made and under which the defendant in error claims title in *failing to make provision* for service of notice of the pending of the proceedings upon a *lienholder*, such as Patrick, a deprivation of property of the *lienholder* without due process of law, within the protection of the fourteenth amendment?" The supreme court of Nebraska had held that the term "owner" as used in the statute meant the owner of the fee, and not a mere lienholder. This is a very different question from that presented by the case at bar. It is undoubtedly sound doctrine that a State has power to provide such a form of notice to the owners of property to be assessed as it may deem necessary or proper, and that if that method is followed it will be conclusive upon this court. It was followed in Leigh *vs.* Green. But, aside from being a case against the contention of plaintiff in error, it is directly in support, for the rule is there laid down that where the State authorizes the sale of land for taxes and the *owner* is *unknown* it may proceed directly against the land by giving notice to "all persons interested." But it is not held that where the owner is known and where the *statute provides for notice* to the owner such provisions can be disregarded merely because the proceeding may be against the land, for it is said: "Of course merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure if *in fact* the property *owner* is deprived of his estate without due process of law."

Wood *vs.* Brady, 150 U. S., 18, upon which defendants in error so confidently rely, simply laid down the doctrine that it was within the province of the State courts to change their decisions construing local statutes—a doctrine we do not question for a moment. But this does not affect the rule contended for by appellant in error. The case is cited to support the theory that the State court had a right to decide that the law of Washington previous to 1889 was a proceeding *in personam* and was afterwards changed to a proceeding

in rem—a rule which we do not controvert. But it is nowhere held in the Brady case, nor in any other of which we have any knowledge, that the *method* established by the statute for *giving notice* can be disregarded simply because the proceeding is *in rem*.

The case of Williams *vs.* Pitlock, 35 Wash., 271 (cited in defendants' brief, p. 35), is fully explained by the Washington supreme court itself in Anderson *vs.* Turatti, 81 Pac., 557 (fully cited in our former brief on the merits, at pp. 28–30).

The Case of Castillo vs. McConnico.

At the oral hearing the case of Castillo *vs.* McConnico, 168 U. S., 674, was called to the attention of counsel for plaintiff in error by Mr. Justice White, and it was suggested that it seemed to be a parallel case to the one at bar. The Castillo case has never been cited by defendants in error, and in some unaccountable manner it has escaped our attention. We have now given it a very careful examination, and are convinced that it is very different from the case at bar in several material respects.

The points of distinction which we find between the Castillo case and the case at bar may be contrasted as follows:

First. Castillo Case.—Castillo claimed that his name was *defectively* entered upon the assessment-rolls, it being entered as "R. Castillo," whereas in fact his name was "Rafael Maria Del Castillo." Case at Bar.—There is no claim made that the names of the owners in the case at bar were *defectively* entered in the assessment-rolls, but that they *were never entered at all*. This is not a mere *irregularity*, but it affects the *jurisdiction* of the court.

Second. Castillo Case.—The statutes of Louisiana provided that the tax deed when issued to the purchaser should be "*conclusive* evidence of the following facts: 1st. That the

property was *assessed* according to law; 2d. That the taxes were *levied* according to law; 4th. That the property was *adjudicated* and *sold* as *stated* in said deed; and 5th. That *all the prerequisites were complied with* by all the officers from the assessment up to and including the execution and registry of the deed to said purchaser." And the supreme court of Louisiana, in the Castillo case, passing upon this statute, said: "We are relieved of the necessity of passing upon the question of the sufficiency of the *assessment* of the property sold under it. The question of the competency of this legislation in this respect has been before this court on repeated occasions. The argument now addressed to us against the constitutionality and interpretation of the act must be viewed as directed against a series of decisions of this court. To those decisions we must adhere, and hold that *the act* precludes inquiry." In view of such a statute and such a decision by the highest court of the State, there can be no doubt that this court was bound to say, as it did, that it was precluded from considering the appeal of Castillo—especially when the jurisdiction was invoked upon the *sole* ground of a *defective* entry of the name on the rolls, and not of the *entire absence* of the name. CASE AT BAR.—There was no statute in the State of Washington at the time when the deed was issued to defendant in error making the deed *conclusive* evidence; but there was a statute prescribing that the deed should be "*prima facie* evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns, to the real estate thereby conveyed of the following facts: *First.* That the real estate conveyed was subject to taxation at the time the same was assessed and has been listed and assessed in the time and manner required by law. *Second.* That the taxes or assessments were not paid at any time before the sale. *Third.* That the real estate conveyed had not been redeemed from the sale at the date of the deed. *Fourth.* That the real estate was advertised for sale in the

manner and for the length of time required by law. *Fifth.* That the real estate was sold for taxes, assessments, penalties, and costs, as stated in the deed. *Sixth.* That the grantee in the deed was the purchaser or assignee of the purchaser. *Seventh.* That the sale was conducted in the manner required by law." (See Laws Wash., 1893, p. 382, sec. 132.) This particular statute has not, so far as we are aware, been directly passed upon, but a similar statute of that State (see Laws Wash., 1871, p. 48, sec. 40) has been adjudicated by the supreme court of the State of Washington in the case of Hurd *vs.* Brisner, 3 Wash., 1. The case is also reported with a note by the learned Judge Freeman in 28 Am. St. Rep., 17. It was held in that case, following the general rule, that this statute only *shifted the burden* from the defendant to the plaintiff. That burden has been accepted by plaintiff in error and he has brought his proof to overcome the presumption of law. But we have a decision of the supreme court of Washington which holds directly contrary to the supreme court of Louisiana, upon a statute formerly in force (since repealed), reading as follows: "Such tax deed, duly acknowledged or proven, is (except as against actual fraud) *conclusive* evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." In Herrick *vs.* Neiz, 16 Wash., 74 (which we have already cited several times in our former briefs upon the merits, and to which we shall again presently refer), the supreme court of Washington (following the rule adopted in Miller *vs.* Miller, 96 Cal., 376) held that the words "*conclusive* evidence" had reference only to the acts of the assessing officers and not "to something required to be done by the applicant for the deed." This rule brings the case at bar clearly within its terms by reason of the failure of the tax purchaser to serve the owners with notice of the expiration of the period of redemption, and the rule was, in fact, there announced upon the same state of facts.

Following the provisions of the act of 1893 above quoted, there is the following paragraph: "But any judgment for the sale of real estate for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop the parties from raising any objections thereto or to a tax title based thereon which existed at or before the rendition of such judgment and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered. And as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid or the real estate was not liable to the tax or assessments." This paragraph was invoked in the Galvin case (fully discussed in our former brief), and the Federal circuit court thus disposed of the matter: "The statute makes a judgment conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable for the tax or assessments. This provision must be understood as being applicable only to judgments rendered by a court in the *exercise of jurisdiction* conferred by law. It is contrary to the principles of our Government for the legislature to make a law giving conclusive effect to a judgment rendered by a court acting without having jurisdiction." So we have here two decisions of the State supreme court and one of a United States circuit court construing the terms "*prima facie*" and "conclusive" evidence, all of them agreeing that such statutes do not and cannot apply to any question affecting the *jurisdiction*.

Third. CASTILLO CASE.—Castillo did not specifically "set up and claim" the jurisdiction of this court, but he relied upon the rule "that a Federal question was *necessarily involved* in and was passed upon by the decision below," it being *conceded* that the question was not raised on the record.

CASE AT BAR.—Plaintiff in error did specifically "set up and claim" the Federal question, and this fact appears by the record (as has already been shown).

Fourth. CASTILLO CASE.—Castillo made no claim of any defective proceedings, except such as were involved in the neglect of duty by the *assessing officers*, namely, in improperly entering his name upon the original rolls, and this court declared that his claim, based upon such an irregularity, was to the "last degree technical and unreasonable and cannot be indulged in." CASE AT BAR.—Plaintiff in error does not rely solely upon the failure of the *assessing officers* to give him notice of the assessment and sale, as the law required, but he also complains of the failure of the *tax purchaser* to give him notice of the expiration of the period of redemption. This is a very different proposition from that involved in the Castillo case. It was said by the supreme court of Washington, in Herrick *vs.* Neiz, *supra*, that what might be overlooked or excused as a mere "irregularity" in a proceeding *in rem*, when the duty is imposed upon a *taxing officer*, cannot be overlooked or excused when "something is required to be done by the applicant for the deed." Let us concede, for the purpose of the argument, that the failure of the taxing officers to give notice to the owner of the proceedings by which his property was taken *by the State* was an irregularity merely, and that *because* the proceeding was a proceeding *in rem* he was *bound* to take notice thereof. Does or can this excuse the failure of the tax *purchaser* to give notice of the expiration of the period of redemption? We might go even further than this and concede that all the *taxing* proceedings were *regular* and that due notice of every step had been given to the owner. So far as the *State* is concerned, so far as the collection of the *revenue* is concerned, in other words, so far as the proceeding *in rem* is concerned, it is terminated and concluded when the property has been sold

and the tax has been enforced. The State is not concerned with whether the tax purchaser ever asks for or receives a *deed* to the property. That is a matter which concerns him only. It is a matter with which the proceeding *in rem* has nothing to do. It is a matter in which the question of *general* notice or *implied* notice is not involved. The statute itself has presented what the owner must do *if he desires to take out a deed.* It has prescribed an independent form and method of notice. We most earnestly request this court to examine the case of Herrick *vs.* Neiz (*supra*), particularly the authorities cited by the Washingtan supreme court in that case on pages 80–81 of the 16th Wash. This point presents a question not of *local law* merely. It presents the broad question whether a State statute which provides for the giving of notice by a private citizen to a private citizen before he can acquire title to private property can be entirely disregarded, and whether the supreme court of the State can, by its decision, preclude this court from passing upon this question according to its own judgment. To give the decision such a construction is to overrule the Chicago, Burlington and Quincy case, the Scott case, and Bellingham Bay case, and the other authorities considered and cited by plaintiff at pages 6–7 of his brief on the motion to dismiss, and also at pages 10–13 of his brief on the merits.

Fifth. CASTILLO CASE.—The court says: "The notice *required by the statute* to be given of the opening of the assessment rolls for inspection and revision was not addressed to each particular person assessed, but was afforded by a general publication, calling upon all persons having property subject to taxation to come forward and ask for such correction as they desired to have made" (citing statute). The court then proceeds to say that "It cannot be doubted that in the exercise of its taxing power the State of Louisiana *could* have directed that the property subject to the

taxing authority should be assessed without any reference whatever to the name of the owner, that is to say, by any such description and method as would have been legally adequate to convey either actual or constructive *notice to the owner*." And in support of this proposition (which we do not controvert) the case of Witherspoon *vs.* Duncan, 71 U. S., 210, is cited. But in Witherspoon *vs.* Duncan the only question presented was whether the State of Arkansas, which had entered into a compact with the United States to abstain from taxation of public lands within her borders, could authorize and collect a tax upon such lands after they had been entered by private individuals under the Federal land laws. This court said that "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they become private property." The court then proceeds to hold that "The power to tax exists as soon as the *ownership* is changed, and this is effected when the entry is made on the terms and in the modes allowed by law." Based upon this state of facts, this court declared that it was not its province to interfere with the "*policy* of the revenue laws of the States, nor with the interpretation given them by their courts." CASE AT BAR.—No issue is taken with the rule laid down in Witherspoon *vs.* Duncan, nor in the Castillo case, because it concerns statutes which were *strictly complied with*. We concede, for the purposes of the argument, that the State of Washington *might* have provided for an assessment without giving direct notice to the owner, and might have provided for the issuance of a tax deed without notice to the owner. But it is sufficient to distinguish the case at bar from the Castillo case and the Witherspoon case that the legislature did *not* so provide.

Sixth. CASTILLO CASE.—It was suggested at the oral hearing that there was some similarity between the Castillo case

and the case at bar in the fact that the supreme court of Louisiana suddenly changed its rule, making the decision in the Castillo case turn upon a point which it had previously uniformly decided the other way. If such was the fact, it does not appear in the opinion. The State decisions appear to have been uniformly to the same effect as in the Castillo case; but it seems that Castillo urged the court to change its ruling, which it refused to do. Subsequently, however, to the Castillo case it held that an assessment made in the name of a person *deceased* rendered the assessment wholly void, but this court did not think that the State court had, therefore, necessarily departed from its former line of decisions. CASE AT BAR.—It is conceded that the Washington supreme court did change its ruling, and that the change occurred subsequent to the adoption of the rule by the Federal courts and after the rights of plaintiff in error had become vested. It is also urged that the supreme court has since returned to its original holding.

Seventh. CASTILLO CASE—Finally, it is said in the Castello case: "When, then, a State court decides that a particular formality was or was not essential under the State *statute* such decision presents no Federal question, providing always the State statute, as *thus construed*, does not violate the Constitution of the United States by depriving of property without due process of law. This *paramount* requirement being fulfilled as to other matters the State interpretation of its own law is controlling and decisive." CASE AT BAR—With the rule just stated there is no controversy on the part of plaintiff in error. He is *accepting* the decisions of the supreme court of the State that the *statute* provides a proceeding *in rem;* that when the State has once acquired jurisdiction of the *res* according to the method established by that statute it has the power to proceed with the collection of the taxes, provided it does so as provided by the *statute*. But the supreme court went much further than this,

and hold that the provisions of the statute in question, which were designed for the purpose of giving the owner *notice, need not be observed*, and the statute as *thus* construed does "violate the Constitution of the United States by depriving of property without due process of law." The process prescribed *by the statute* has been denied to plaintiff. This is a Federal question and one which calls for the exercise of the independent judgment of this court. To hold otherwise is to say that the State court, by its *decision*, may take away from a citizen that which the *legislature* has provided for his protection, and is for this court to abdicate its constitutional duty as announced in The Chicago, Burlington and Quincy case and other cases already cited.

THE GENERAL STATUTORY REQUIREMENTS AS TO NOTICE.

At the oral argument the question was propounded to counsel for plaintiff in error by Mr. Justice White whether the statutes of Washington, under which plaintiff's property was *assessed*, provided for the publication of *general* notice of the initiation of the *assessment* in the usual manner of proceedings *in rem*, "to all persons interested," etc. Counsel for plaintiff confessed his inability to answer the question at that time, but counsel for defendant stated that the statutes did so provide, and also stated that the language of the statute appeared in the "addenda" to his brief. Upon examining the "addenda" (pp. 4–5) we find that portions of the statute of 1889–'90 (which is the statute declared by the supreme court to be the one under which the property in controversy was *assessed*, but not the one under which it was *sold*) set out in such manner as to give the impression that the notice appearing at the bottom of page 5 is the notice of the *assessment*, whereas in fact it was prescribed for notice of the *sale* and never became effective, because it was superseded by the act of 1893, as will appear by reference to the opinion in this case where it is said that

"the property was *sold* in 1894 under the provisions of the revenue act of 1893."

The act of 1889–'90 did not make provision for any *general* notice to be given prior to the *completion* of the assessment. It did prescribe that "on receiving the tax books from the county auditor, the treasurer shall give notice, by publication in some newspaper having general circulation in the county, once in each of three successive weeks that the assessment books have been turned over to him for the *collection* of taxes." (See Laws Wash. 1889–'90, p. 561, sec. 85.) No notice was to be given (as was the law in the Castillo case) requesting any person interested to appear and correct the rolls or to do anything except *pay* the taxes. The rolls were made up unalterably when the notice was given. In this respect the act is very materially different from the acts relied upon in the Castillo case and in Leigh *vs.* Green.

The statute of 1893, which the supreme court declares was the one under which appellant's property was assessed, did make provision for the publication of general notice of the proposed *sale*. But even this notice was very different from that usually prescribed in proceedings *in rem*. It was not addressed to "all persons interested," but to the *owner*. We quote the language of the statute as follows (see Laws Wash. 1893, p. 366, sec. 96):

"The county treasurer shall during the month of April in the second year following the date of delinquency of any taxes on real property, publish an advertisement giving notice of the intended application for judgment for sale of such delinquent lands and lots, in a newspaper published in his county, if any such there be, or if there be no such paper printed in his county, then he shall post three notices of such intended application in the most conspicuous places in such county, one of which shall be at the door of the courthouse at the county seat of such county. Said advertisement shall be published once each week for three successive publications, and the last of such publications shall be at least one week prior to the date fixed in such advertisement for such intended application. Said advertisement shall con-

tain a list of the delinquent lands and lots upon which the taxes remain due and unpaid, the *names* of the *owners*, if known, the total amount due thereon, and the year or years for which the same are due. Said treasurer shall therein give notice that on the second Monday of May in such year he will apply to the superior court of his county for judgment against said lands and lots, for said taxes, penalties, interest, and costs, and for an order to sell said lots and lands for the satisfaction thereof; and shall also give notice that on the day to be fixed by the court, the lots and lands for the sale of which an order shall be made will be exposed to public sale at the front door of the court-house, in said county for the amount of taxes, penalties, interest and costs due thereon; and the advertisement published *according to the provisions of this section*, shall be deemed sufficient notice of the intended application for judgment and of the sale of the lands and lots under the order of the said court."

It will thus be seen that the published notice of the proposed sale was not addressed "to all persons, companies, or corporations who have or claim any estate, right, title, or interest in, or claim to, or lien upon" the lands, as is indicated in the notice appearing at the bottom of page 5 of the "addenda." The published notice must be addressed to the *owner*, if known, and in the case at bar it is conceded that the owner was known.

This statute provides, as it will be at once observed, for a proceeding in the regular courts of the State. The notice prescribed by the statute to be given was necessary to be given before the court could acquire *jurisdiction* of the *res* for the purpose of making a sale.

In this connection we beg the court to consider the cases decided by the Washington court and reviewed in our former brief on the merits at pages 23 to 31, and particularly the case of Anderson vs. Turatti, discussed on pages 28 to 30.

THE ABSENCE OF NOTICE OF EXPIRATION OF REDEMPTION.

We wish to again remind the court that plaintiff in error is not depending merely upon the *taxation* proceeding—the proceeding *in rem*—but that he is insisting that, never having had any notice of the expiration of the period of redemption, and, therefore, an opportunity to redeem, he has been deprived of his property without due process of law.

The facts are fully shown by the record and discussed at pages 36 to 53 of our former brief on the merits. The question, then, is, according to the rule announced in the Castillo case, did the statute *as construed* by the supreme court of Washington deprive of property without due process of law?

We conclude by directing attention to the argument of counsel for defendants that the redemption statute of Washington should be construed according to the decisions of the State of Iowa instead of those of the State of Illinois, because the statute of Iowa is "almost identical with the statute of Washington," as is said at page 26 of the brief of defendants. We are sure that a comparison of the Iowa statute with the Washington statute will scarcely disclose that they are "identical" or even similar. The Iowa statute may be found in McClain's Codes, 1888, section 1379, and reads as follows (compare with Washington statute, fully set out in our former briefs):

"After the expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase *may* cause to be served upon the person *in possession* of such land or town lots and also upon the *person in whose name the same is taxed*, if such person resides in the county where the land is situated, in the manner provided by law for the service of original notices, a notice signed by him, or his agent, or attorney, stating the date of sale, the description of the land or town lot sold, the name of the purchaser, and the right of redemption will expire

and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service thereof. Service may be made upon *non-residents* of the county by publishing the same three times in some newspaper printed in said county, and if no newspaper is printed in said county, then in the nearest newspaper published in this State. But any such non-resident may file with the treasurer of the county a written appointment of some resident of the county where his lands or lots are situated as agent upon whom service shall be made, and in such case personal service of said notice shall be upon said agent. *Service* shall be *deemed completed* when an affidavit of the service of said notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer authorized to execute the tax deed. Such affidavit shall be filed by said treasurer and entered upon the records of his office, and said record or affidavit shall be *presumptive evidence* of the *completed service* of notice herein required; and until ninety days after the service of said notice the right of redemption from such sale shall not expire. Any person swearing falsely," etc.

This Iowa statute does not create any *condition precedent* as does the Illinois statute. It simply says that the holder of the tax certificate *may* serve notice of the expiration of the period of redemption; and that *if* he does he may file the affidavit which will constitute "presumptive evidence" of the manner of service. It also provides that when the person to be served is a *non-resident* he may *appoint an agent* in the State to receive service in lieu of service by publication, and that in such case the service will be binding.

In leaving the question of notice of expiration of the period of redemption with this court, duty requires that we should call attention to the attempt made at pages 42–43 of defendants' brief on the merits (and also at the oral hearing) to impress this court with the idea that plaintiff in error has *corrected* their title for them by the evidence which he is alleged to have introduced at page 105 of the record. An

examination of that record will show that counsel for defendants requested permission of the court to ask plaintiff's witness a question "*for information before objecting*" to a document which plaintiff had offered in evidence. The questions were asked, counsel for defendants objected, and the court overruled the objection. Now counsel ask to have this court accept such evidence as having been offered by plaintiff, when as a matter of fact it is not before the court for any purpose. It is like asking the jury to consider testimony which the court has stricken out.

The fact is that counsel for defendants, realizing the absolute insufficiency of their record, sought to correct their title during the entire progress of the evidence, as will be seen by an inspection of the record at pages 101, 102, 105, 106, 119; and each time the court refused to allow it, stating that the tax title must stand or fall upon the record as already made up. Even the questions and answers thus injected into the record show conclusively that defendants had not complied with the law. In their desperation to correct their title, they further exposed its weakness by showing that there were "tenants and occupants" of the property who had not been served with any notice at all.

It has already been sufficiently established by the law and the authorities that all the facts showing compliance with the statute must be furnished *before* the deed is issued, and cannot be supplied afterwards. (See our former brief on the merits, at pages 44–46.)

Respectfully submitted.

TWYMAN O. ABBOTT,
Attorney for Plaintiff in Error.

Office Supreme Court U.
FILED
SEP 19 1904
JAMES H. McKENNEY,
Clerk

No. 849

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

HENRY FRENCH, - - *Plaintiff in Error.*

vs.

H. C. TAYLOR and LIDA R. TAYLOR his wife. J. W. MCCONNAUGHEY, D. F. MCCONNAUGHEY and C. K. MCCONNAUGHEY,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

On Motion to Dismiss Writ of Error.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

JEFFERSON CHANDLER,
WILLIAM H. BRINKER,
RICHARD SAXE JONES,

Attorney for Defendants in Error,

Office and Post-office Address:
Rooms 7 and 8 Colman Block, Seattle, Washington.

TRADE REGISTER PRINT, SEATTLE

IN THE

Supreme Court of the United States

OF AMERICA

HENRY FRENCH, Plaintiff in Error, vs. H. C. TAYLOR, and LIDA R. TAYLOR his wife, J. W. McCONNAUGHEY, D. F. McCONNAUGHEY and C. K. McCONNAUGHEY, Defendants in Error.	MOTION TO DISMISS WRIT OF ERROR.

ERROR TO SUPREME COURT OF THE STATE OF WASHINGTON.

Come now the defendants in error and appearing jointly for the purpose of this motion only and not otherwise, move this Honorable Court to dismiss the writ of error heretofore in this cause sued out by the plaintiff in error.

This motion is based upon the ground that this Court has no jurisdiction of this cause; and as reasons therefore respectfully submit:

I.

That no Federal question is raised by the records in this cause.

II.

That this writ of error is issued upon the final judgment or decree in a suit in the highest court of the State

of Washington and nowhere "is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States."

III.

That no Federal question was ever in anywise submitted to the Supreme Court of the State of Washington in this cause, nor in anywise by it decided.

And united with this motion defendants in error move to affirm the decision of the Supreme Court of the State of Washington on the ground that, although the record may show that this court has jurisdiction, it is manifest that the writ of error in this cause was taken for dtlay only or that the question upon which the jurisdiction depends is so frivolous as not to need further argument.

Very respectfully submitted,

JEFFERSON CHANDLER,
WILLIAM H. BRINKER, and
RICHARD SAXE JONES.
Attorneys for Defendants
in Error.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

HENRY FRENCH, Plaintiff in Error, vs. H. C. TAYLOR, and LIDA R. TAYLOR his wife, J. W. McCONNAUGHEY, D. F. McCONNAUGHEY and C. K. McCONNAUGHEY, Defendants in Error.	NOTICE OF MOTION.

TO THE PLAINTIFF IN ERROR AND TO T. O. ABBOTT, HIS ATTORNEY:

You will please take notice: That the defendants in error have moved the Honorable, the above entitled court, to dismiss the writ of error heretofore sued out in the above entitled cause and in said motion have further moved that the judgment of the Supreme Court of the State of Washington herein be affirmed, on the ground that it is manifest that the writ of error was taken for delay only or that the question on which the jurisdiction depends is so frivolous as not to need further argument; and a copy of said motion is herewith served upon you, together with a copy of the brief of defendants in error in support of said motion.

You are hereby further notified that said motion will be brought on regularly for hearing on Monday the 10th

day of October A. D., 1904, before the Honorable the above entitled court, being the second Monday in said month, at the court room of said court in the city of Washington, District of Columbia, United States of America, at the hour of twelve o'clock m. of said day or as soon thereafter as counsel may be heard and as shall suit the convenience of said court.

Very respectfully,

JEFFERSON CHANDLER,
WILLIAM H. BRINKER, and
RICHARD SAXE JONES.
Attorneys for Defendants
in Error.

Served Sept. 9, 1904.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

HENRY FRENCH, Plaintiff in Error, vs. H. C. TAYLOR, and LIDA R. TAYLOR his wife, J. W. McCONNAUGHEY, D. F. McCONNAUGHEY and C. K. McCONNAUGHEY, Defendants in Error.	BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

In preparing this brief we must first apologize to this Court for our inability to refer to the pages of the record in as much as the time since the writ was sued out has been so short that no printed record has been served or received, but this motion being based upon questions of law alone it will be almost unnecessary to state the facts further than to bring to the attention of this Court the nature of the case. If the Court should deem the paging at all material we respectfully ask leave to insert the same.

This suit arose in the Superior Court of the State of Washington in and for the county of King, holding terms in the city of Seattle, upon an action brought by Sarah Woodward (for whom were afterwards substituted Sarah Woodward and John H. McGraw, administrator;

and in the Supreme Court, after final judgment, was substituted Henry French the present plaintiff in error) against the defendants in error, upon five separate causes of action, which by amendment and delimination were reduced practically to three causes of action.

I.

The first cause of action was to set aside a tax deed standing in the name of H. C. Taylor, to certain property in the city of Seattle which at the time of the assessment of the taxes belonged to Sarah Woodward.

The grounds for setting aside the tax deed set forth in the complaint being certain defects, in the assessment of the tax itself, in the sale for taxes, in the notice of intention to apply for a tax deed and in the deed itself.

II.

The second cause of action was to set aside a quit claim deed given by Sarah Woodward, whose successor is the plaintiff in error, to the defendant D. F. McConnaughey for the benefit of all of the defendants in error, (which quit claim deed was to the same premises) for a consideration of $1,500.00; the grounds for setting aside the same are immaterial to this discussion but were largely based upon the fact that the plaintiff was an elderly woman and claimed that she had made the deed under misapprehension of the facts.

III.

The third cause of action was to set aside a sheriff's deed to the same property executed to the defendant in

error, D. F. McConnaughey, for the benefit of all of the defendants in error, upon the ground that the same had been practically purchased by said defendant in error under and by virtue of the illegal title which it was claimed he held through the tax deed and the quit claim deed and that therefore he should be held to be a trustee for Sarah Woodward the original plaintiff in the action.

IV.

The other causes of action are immaterial so far as this motion is concerned.

* * * * * * *

At the trial of this cause in the Superior Court of the State of Washington evidence was introduced by plaintiff Sarah Woodward through her attorney, now representing the plaintiff in error, for the purpose of proving the first cause of action, namely, that the tax title was insufficient and should be set aside.

At the close of the evidence on this first cause of action, plaintiff having through her counsel stated that all of her evidence had been submitted so far as that cause of action was concerned, the trial court rendered judgment in favor of the defendant in error upon the ground that it, the trial Court, sustained the tax title as good and sufficient under the laws of the State of Washington and therefore there was nothing left to try of the other causes of action.

Appeal was duly taken to the Supreme Court of the State of Washington, argument had, briefs submitted and

the decision of the trial Court affirmed upon the 19th day of September, A. D., 1903. (Wash Rep. Vol. 33 p. 1). A petition for re-hearing was duly filed and counsel for defendants in error required to respond thereto, elaborate briefs filed and said petition denied on February 29, 1904. (Wash. Rep. Vol. 33 p. 11).

* * * * * * *

Nowhere in the record of this cause from the time of the filing of the first complaint until the writ of error was sued out was it ever suggested that a federal question was involved except as it may be claimed (we will show that the claim is without foundation) that it is raised by paragraph 11 of the first cause of action of the complaint which reads as follows: "That all the proceedings in this paragraph hereinbefore *renumerated* was and were in violation of article five and the first section of article 14 of the amendments to the Constitution of the United States and of section three of article one of the Constitution of the State of Washington in this that it constitues an attempt to deprive plaintiffs of their property without due process of law." Nowhere in the record and never at any time either in oral argument, written argument, brief, assignment of error, or otherwise was this question ever suggested until the writ of error was sued out to this court.

Attached to the petition for writ of error is an assignment of error which reads as follows, to-wit: "Comes now the above plaintiff in error and respectfully

submit that in the record, proceedings, decision and final judgmen of the Supreme Court of the State of Washington in the above entitled cause there is a manifest error in this, to-wit:

I.

The court erred in holding that the matters and proceedings alleged in the first cause of action in the second amended complaint herein constituted due and lawful proceedings under the various acts of the legislature of the State of Washington providing for the assessment and collection of taxes on real property in said state for the year 1891, and that said proceedings were not in conflict with nor in violation of section one of article fourteen of the amendments to the constitution of the United States, and that plaintiff in error, and his predecessor in interest, was and were not deprived of the property described in the said cause of action of said complaint without due process of law; and it particularly erred in holding that due and lawful notice of the pendency of the alleged proceedings for the taxation of said property and for the enforcement and collection of taxes for the year 1891, then in force and applicable thereto, had been given to the owners of said premises; and it particularly erred in holding that the said Woodward and the estate of Henry S. Woodward, deceased, (the predecessors in interest of the plaintiff in error herein, and who were the sole and only owners of the property hereinbefore referred to at a time when a deed was claimed to be due

by the defendants in error under and by virtue of the erroneous proceedings for the taxation of said premises for the year 1891) had received due and regular notice of the application for the issuance of a tax deed as provided and guaranteed by sections 127 and 128 of the act of the legislature of the State of Washington, approved March 15th, 1893; and it particularly erred in denying to plaintiff any relief from the cloud upon the title of plaintiff to the premises hereinbefore referred to, created and existing by virtue of the erroneous proceedings hereinbefore referred to.

II.

The court erred in affirming the judgment of the Superior Court of the State of Washington for King county, entered upon the 3rd day of June, 1902, herein, and directing and ordering a judgment to be entered in said Supreme Court of the State of Washington adjudging costs against the plaintiff in error herein in the sum of fifty-nine and 04-100 dollars.

T. O. ABBOTT,

Attorney for Plaintiff in Error."

We think the foregoing is a sufficient statement of the facts to support our argument upon the law.

BRIEF OF THE ARGUMENT

POINT I.

Our first position is that paragraph eleven of the complaint heretofore quoted and the assignment of errors hereinbefore set forth do not raise any question as to the validity of a statute of or an authority exercised under any State.

This court will readily see from a reading of the paragraph of the complaint quoted and of the assignment of errors that the only attempt to raise any question as to the constitutionality of anything is as to the constitutionality of certain acts of county officers and of the defendants in error.

Nowhere is there a suggestion that the statutes of the State of Washington for 1889, 1890, 1891 or of 1893 are of themselves in conflict with the Constitution of the United States, but simply set forth that certain things which had been done by taxing officers of the county of King and by the defendants in error were violations of the Constitution.

This is not such a case as this Court will review under section 709 of the revised statutes, for, as this Court has well said, "That the authority conferred on a court to hear and determine cases in a state, is not the kind of authority referred to in the 25th section (Judiciary Act 1789); otherwise every judgment of the Supreme Court of a state would be re-examinable under the section."

Bethel vs. Demaret, 10 Wallace, p. 537.

In the case at bar the trial court decided that the *facts proven* show that we had fully complied with the statutes in perfecting our tax title.

The Supreme Court of the state decided as a matter of fact that we had complied with the statute in perfecting our tax title and that the statute itself was a statute providing for taxation *in rem*. This is all that was raised and all that was passed upon, the statute itself being nowhere and at no time attacked.

Will this Court entertain jurisdiction to determine whether the views of the state court as to the facts in any case are correct simply because the attorney for the plaintiff in error does not agree with the Supreme Court of the state? If so every complaint can be so framed and every cause so tried as to entitle the plaintiff to a writ of error to this Court. It has been repeatedly decided by this Court that under the second clause of Sec. 709 Revised Statutes, the statute of a state must be attacked as unconstitutional, or the authority of the state, and in the case above cited it was held that the decision of the Supreme Court of a state was not such authority as is referred to in the statute itself.

In line with the decisions above referred to is the decision of this Court in the case of *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.* (125 U. S. p. 18), in which the clause of the constitution in regard to the impairment of the obligation of contracts was under discussion and this Court, quoting from *Knox vs.*

Exchange Bank, 79 U. S. (12 Wallace) p. 379, says "we are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts or because those judgments in their effect impair the obligation of contracts. If we did, every case decided in a state court could be brought here where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

The court will observe that in this first point made we do not take the position, which will hereafter be submitted, as to the question involved in the litigation being a federal question, but limit ourselves to the fact that no federal question has been raised by the complaint or the assignments of error, in as much as the attack is solely upon proceedings of county officers and acts of the defendants in error and not upon the state statute.

POINT II.

We now submit that if a federal question were involved in this writ of error and the litigation upon which it is based, the same has not been properly raised in the Supreme Court of the State of Washington.

As the record shows, the only place where such a question is even suggested is in paragraph eleven of the complaint.

In the case of *Bellingham Bay & British Columbia Railroad Company vs. City of New Whatcom*, (172 U. S. p. 314) this court said: "By its answer defendant

raised a federal question in as much as it alleged that the notice of the re-assessment was insufficient, and specificially that by reason thereof its property was sought to be taken without due process of law and in conflict with the terms of the 14th amendment to the constitution, this court, therefore, has jurisdiction of the case," but it will be observed that upon a further reading of the opinion the question there raised was whether the *statute itself*, by limiting the notice of a re-assessment to ten days, was in conflict with the constitution of the United States.

Paragraph eleven of the complaint in this action is absolutely irrelevant and immaterial.

If this paragraph were taken from the complaint entirely the complaint would state exactly the same cause of action that it does with this paragraph included. There is not a single fact therein stated which is necessary to plaintiff's cause of action but a mere conclusion of the pleader that from previous facts stated in the complaint plaintiff has been deprived of due process of law and nowhere is there any allegation in said paragraph eleven that *the statute* under which these acts referred to in paragraph eleven of the complaint were done, was in contravention of the Constitution of the United States.

Therefore, for this court to take jurisdiction of this cause upon the ground that a federal question is raised, and properly raised, in the trial court, this court must hold that such a question can be raised by an immaterial

allegation in the complaint, which is nothing more than a conclusion from the facts otherwise pleaded, and must further hold that an allegation that the acts of certain private persons are such as to contravene the constitution will give this court jurisdiction.

* * * * * * *

A mere cursory reading of the decision in the Bellingham Bay case above referred to leads one to feel that it is in conflict with many other well reasoned cases which have been decided by this court, but we feel certain that such conflict arises only from a lack of a full and complete statement of the Bellingham Bay case.

It has been repeatedly held by this court that the judgment or decree of a state court can not be re-examined in this court simply because a federal question was presented to the state court for determination, but that that court must also have decided it.

Crowell vs. Randall, 10th Peters 368; also numerous cases cited in Note 3 on p. 42 of Vol. 63 L. R. A.

And in cases which seem to have varied from this rule this court has still held that the decision of the federal question *must necessarily have been involved* in the judgment rendered.

Chapman vs. Goodnow, 123 U. S. 540 (see note L. R. A. supra).

In the case at bar this court will learn from the record and from the opinion of the state court that the state court never had in view the decision of any federal

question,—in fact the question was never called to its attention except by the immaterial allegation in the complaint hereinbefore referred to; which was never *mentioned* after the pleading was filed a year before in the trial court.

Under Sec. 709 R. S. the state court must render a "decision" in favor of the validity of a statute or authority.

How can such a *decision* be rendered when the question was never presented to the state court?

The state court decides this case on local grounds alone as it had no suggestion before it that a federal question was involved.

Telluride Power Trans. Co. vs. Rio Grande Ry. Co., 187 U. S. p. 569.

It may well be assumed that the plaintiff in error abandoned this position stated in the complaint, for nowhere, not even in the assignments of error by which the attention of the Supreme Court of the State was called to the errors depended upon for reversal, did the plaintiff in error suggest that a federal question was involved or that the Constitution of the United States had in anywise been jeopardized.

Errors are assigned in the Supreme Court of the State of Washington under rule twelve on page nine of the edition of July 15, 1901, which reads as follows: "No alleged error or mistake of the Superior Court will be considered by the Supreme Court unless the same be

clearly pointed out in the appellant's brief," and nowhere in the brief of appellant (plaintiff in error here) was any such assignment of error made and nowhere in the argument was it even suggested.

Further, this court has repeatedly held that where the decision of the Supreme Court of a state may have been based upon some other than the constitutional question and a constitutional question does not clearly appear to have been determined by the Supreme Court of a state that a writ of error will be dismissed.

Telluride Power Transmission Co. vs. Rio Grande Western Railway Co., Supra, and many other cases to the same effect.

The decision of the State court in this cause was clearly based upon matters exclusive of any federal question. Repeated readings of this decision show that it is simply based upon two propositions; first, that the tax laws of the State of Washington beginning with 1889, and continuing subsequently thereto, provided for taxation *in rem* and this tax title began and was completed under these laws; second, that as a question of fact the defendants in error had fully complied with the laws from 1889 to 1893 inclusive. These are purely local questions of taxation and nowhere does it appear in the decision or in the record that the Supreme Court of the State of Washington had before it, had suggested to it, or took into consideration the federal question sought to be raised by this writ of error. Upon this point alone the writ should

be dismissed.

As this court has said:

"But their rights under that section depended upon questions of fact and questions of local law. The questions of fact were found against plaintiff in error; and the questions of local law we can not review."

Telluride Power Transmission Co. vs. Ry. Co., supra.

POINT III.

There is no federal question involved in this case.

It will be assumed, and is true, that no other questions arose in the trial of this case than those alleged in the first cause of action of plaintiff's complaint. This case was decided in the trial court and again in the Supreme Court of the State of Washington solely upon the first cause of action, and the only questions involved and tried were those set forth therein, which questions may be summed up as follows:

First: That in the assessment roll the name of the owner was improperly given.

Second: That the affidavit or return made by the Assessor was insufficient.

Third: That the certificate of the county Auditor was made at the conclusion of the tax list instead of at the conclusion of each book containing the same.

Fourth: That the delivery to the county Treasurer by the county Auditor was not strictly in compliance with law.

Fifth: That in the judgment record the name of the owner improperly appeared.

Sixth: That personal notice was not given to the plaintiff of the application for the tax deed.

Seventh: That the affidavit of notice was insufficient.

Eighth: That the defendant Taylor had not paid all of the previous taxes.

Ninth: That the signature to the tax deed was not sufficient.

Upon all of these questions of fact the state courts found against the plaintiff, and with these questions of fact before the Supreme Court of the State of Washington that court determined that the local laws for taxation during the period covered by this complaint were laws for taxation *in rem* (Washington Rep. Vol. 32, p. 1; that notice was given as required by law; that the name of the owner was not essential to the assessment; that the entire proceeding was a proceeding *in rem*, and that plaintiff, upon her own showing (for no testimony was taken on behalf of defendants) was unable to make a case within her complaint. Thus it is clearly apparent that there was no federal question involved in this case, for, as this court has said in the case of *Telluride Power Transmission Company vs. Rio Grande Ry. Co., supra*, after quoting from a decision of the Supreme Court of Utah, "This conclusion did not involve the decision of federal questions, the first ex-

pressed the meaning and decision of local statutes, the second depended upon a question of fact; neither, therefore, is reviewable by us."

This entire case, it seems to us, has been decided by this Court in the case of *Leigh vs. Green*, on February 23rd, 1904, and reported in the 24th Supreme Court Reporter beginning at page 390. That case seems to be squarely in point with the one at bar, and to quote from it would require quotation in full. It was there held that a statute providing for taxation *in rem*. was constitutional; that summary methods of seizure and sale could be had; that the court having jurisdiction over *the res*, might proceed to adjudicate the rights to the property; the same could be sold and a tax deed issued thereunder would be valid; that such proceedings had not abridged the protection guaranteed by the constitution against the taking of property without due process of law, and therefore a decision upholding such a proceeding does not involve a federal question. Under this decision we maintain that there was no federal question involved in this case.

This view is further sustained in another case squarely in point: *State of Missouri, Ex Rel. Hill vs. Dockery*, 191 U. S., p. 165, which is also reported with a very instructive note in the 63rd L. R. A., beginning on p. 571, in which this court holds, quoting from the syllabus, "A taxpayer who admits that his own tax is correct cannot on the ground that he will be deprived of his property

without due process of law and denied equal protection of the laws contrary to the fourteenth amendment of the Constitution of the United States have a writ of error from the United States Supreme Court to review a construction by the Supreme Court of the state of the statutes thereof as exempting in whole or in part certain corporations from the payment of taxes."

On page 581 of the note in Vol. 63, of L. R. A. above referred to is a summary of cases upon due process of law. This court will find in the notes to several cases reported in the 63rd L. R. A. better briefs upon the subject here involved than we have been able to submit, and we would respectfully refer to the notes to the following cases:

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291; 63rd L. R. A., pp. 33 et seq.

Home for Incurables vs. the City of New York, 187 U. S. 155; 63rd L. R. A., 329, et seq.

Missouri Ex Rel. Hill vs. Dockery, 191 U. S. 165; 63 L. R. A., 571.

Hooker vs. Los Angeles, 188 U. S., 314; 63 L. R. A., 471.

And an additional brief on the subject is found in a note to a decision by the Supreme Court of the State of Oregon denying an application for a writ of error, to-wit, *Apex Transportation Co. vs. Garbade*, found in 62d L. R. A., pg. 513. As we have said, these various notes written by the able editor of the Lawyers Reports Annotated seem

as as to completely cover the questions involved.

POINT IV.

We believe that, even if this court could sustain its jurisdiction in view of its numerous decisions cited above, it will affirm the decision of the Supreme Court of the State of Washington because it is manifest that the only questions which could be raised on this writ of error have been so repeatedly decided, against any contention which plaintiff in error might make, as to render the suing out of the writ of itself frivolous and so frivolous as not to need further argument.

In addition to other cases cited are:

Merchants' Etc., Bank vs. Pennsylvania, 167 U. S. p. 461.

King vs. Mullins, 171 U. S. p. 404.

Very respectfully submitted,

JEFFERSON CHANDLER,
WILLIAM H. BRINKER, and
RICHARD SAXE JONES.

For Defendants in Error.

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JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 57.

HENRY FRENCH, PLAINTIFF IN ERROR,

vs.

H. C. TAYLOR, LIDA R. TAYLOR, HIS WIFE; J. W. McCONNAUGHEY, D. F. McCONNAUGHEY, AND C. K. McCONNAUGHEY, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANTS IN ERROR IN REPLY AND UPON THE MERITS.

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ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

The defendants in preparing this brief, which constitutes, first, a reply brief to the so-called answering brief of plaintiff in error to the motion to dismiss (but which brief of plaintiff in error is really a brief on the merits), and which is also a brief for defendants in error upon the merits, are somewhat embarrassed by a lack of knowledge of the proper interpretation of the rules of this court.

Counsel for plaintiff in error, on page 1 of his brief, says that we should have printed the record and that *he has been so advised* by the clerk of this court.

We have searched the rules of this court in vain to find any requirement for the printing of a record by the defend-

ant in error. If such a rule exists it is not published, and we have been advised by old practitioners at this court that whenever a motion to dismiss is not heard upon a record separately printed that it will be heard when the case is called upon the merits, at which time the *plaintiff in error* is supposed to have printed the record.

We therefore proceed to dictate this brief upon two lines of argument:

1. A reply to the brief of plaintiff in error on the motion to dismiss;

2. Our own brief (defendants in error) upon the merits;

assuming that the plaintiff in error will eventually cause the record to be printed.

REPLY BRIEF ON MOTION TO DISMISS AND AFFIRM.

Points and Authorities.

I.

No contention is made that the tax law itself is unconstitutional.

Bethel *vs.* Demerat, 10 Wallace, p. 537.

New Orleans W. W. Co. *vs.* Louisiana, etc., 125 U. S., p. 18.

II.

The allegation of unconstitutionality in the complaint is a mere conclusion from facts previously stated and not material to the cause of action.

III.

A Federal question cannot be first raised in a petition for rehearing, so as to give this court jurisdiction.

Capital Nat'l Bk. *vs.* 1st Nat'l Bk., 172 U. S., 425.
Oxly Stave Co. *vs.* Butler Co., 166 U. S., 648.
Citizens, etc., Bank *vs.* Owensborough, 173 U. S., 636.
Simmerman *vs.* Nebraska, 116 U. S., 54.
Susquehanna Boom Co. *vs.* W. B. Co., 110 U. S., 57.
Fowler *vs.* Lamson, 154 U. S., 252.
Mu. Life Ins. Co. *vs.* McGrew, 188 U. S., 291.

Unless it is *decided* upon the petition or necessarily involved in the decision thereon. (This is not true in the case at bar.)

Mallett *vs.* No. Carolina, 181 U. S., 589.
Leigh *vs.* Green, 193 U. S., 79.
Chicago, I., L. & St. L. *vs.* McGuire, 196 U. S., 128.
Fullerton *vs.* Texas, 196 U. S., 192.
Dewey *vs.* Des Moines, 173 U. S., 193.

This whole question of jurisdiction is ably reviewed by the Chief Justice in Mutual Life Ins. Co. *vs.* McGrew, 188 U. S., page 291, and in Hooker *vs.* Los Angeles, 188 U. S., 314.

The able editor of the L. R. A. has briefed the questions in notes found in—

62 L. R. A., page 513.
63 L. A. R., page 33.
63 L. A. R., page 329.
63 L. A. R., page 471.
63 L. R. A., page 571.

Giving us a digest of the subject to which we respectfully refer.

IV.

There is no Federal question in this cause decided by the State court.

The decision is that taxation in Washington is *in rem;* its process is against the land and not the person.

This is purely local law and involves no Federal issue.

Wood *vs.* Brady, 150 U. S., p. 16.

V.

The State court decided also that *as a matter of fact*, under the evidence before it, the State law had been substantially complied with, and the court having jurisdiction of *the res* could lawfully sell.

This is no Federal question.

Layton *vs.* Missouri, 187 U. S., 356.

Smiley *vs.* Kansas, 198 U. S., 447.

Telluride Power, etc., Co. *vs.* Rio Grande W. Ry., 187 U. S., 569.

See the State decisions in this cause.

33d Wash'n Reports, pages 1 and 11.

VI.

If the decision of the State court might have been on any other than a Federal ground jurisdiction fails.

Capitol Nat'l Bk. *vs.* 1st Nat'l Bk., 172 U. S., p. 425.

Allen *vs.* Arguimbau, 198 U. S., p. 154.

Telluride Power, etc., Co. *vs.* Rio Grande W. Ry., 187 U. S., p. 569.

The rules of the State court require every *error relied upon* to be assigned.

Addenda, page 1.

No Federal question was so assigned; *ergo*, none was relied upon.

Layton *vs.* Missouri, *supra*.

And none was decided.

Transcript, pages 136-142.

VII.

On the merits, the only point involved is whether due notice was given to the owner:

1. This tax being *in rem*, the assessment is notice.

2. The treasurer published notice to all the world and judgment was duly entered.

Transcript, pages 123–124.

3. Such is due notice and due process of law.

King *vs.* Mullins, 171 U. S., 404.
M'ch'ts Bank *vs.* Penna., 167 U. S., 461.
Leigh *vs.* Green, 193 U. S., 79.
Hodge *vs.* Muscatine Co., 196 U. S., 276.
Tyler *vs.* Judges, etc., 175 Mass., 71.

(Covering the whole subject of proceedings *in rem*.)

4. But not only was such published notice given, actual notice was given to the agent of plaintiff, to every tenant of the property, and all persons in possession, as required by law (Transcript, p. 140).

As the State court found, this was all that was required, and more, too.

Sarah Woodward (plaintiff below) not only had constructive and actual notice, but actually deeded the property to us herself under her own attorney's advice (Transcript, p. 16, sec. IX, of complaint).

ARGUMENT.

Counsel for plaintiff in error in his brief calls to our attention an error in our original brief.

We certainly used an erroneous expression when we said, "nowhere in the record, and never at any time, either in oral argument, written argument, brief, assignment of error, or otherwise, was this question ever suggested until the writ of error was sued out to this court."

The argument in our original brief shows that we had no intention of making quite so broad a statement, because we especially mention the fact that this question was sought to be raised by paragraph 11 of plaintiff's second amended complaint. But what we meant to say was that nowhere in the record was any Federal question *properly* raised—that is, so raised as to give this court jurisdiction to entertain the writ of error.

Our original brief shows clearly that we recognized paragraph 11 of plaintiff's complaint (Brief, page 14).

This is not such a question as can be decided by this court under the second clause of section 709 of the Revised Statutes, the statute of the State not being attacked nor the authority of the State, but only the acts of the county officers; the decision of the supreme court of the State being that those acts were duly and properly performed *as a matter of fact.*

Paragraph 11 of plaintiff's complaint simply states as a conclusion of the pleader, that from previous facts stated in the complaint, to wit, the actions of the taxing officers, plaintiff has been deprived of due process of law, and nowhere is there any allegation in said paragraph 11 or any other part of the complaint that the statute under which these

acts referred to were done was in anywise in contravention of the Constitution of the United States.

Bethel vs. Demerat, 10th Wallace, p. 537.
New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125th U. S., p. 18.
Knox vs. Exchange Bank, 79th U. S., p. 379.

Our motion to dismiss is not based solely upon the position that no Federal question was ever suggested in the court below, but that no Federal question was *properly raised*—that is to say, such a Federal question as under the judiciary act can be reviewed by this court.

The Federal question sought to be raised by the complaint, to wit, that certain acts of certain county officers contravene the Constitution of the United States, is a question of fact and was determined adversely to plaintiff in error in all of the courts.

Counsel asserts that *in the petition for a rehearing* in the supreme court of the State of Washington reference is made by counsel for plaintiff in error to the same question of constitutionality. Where? *We search the record in vain to find it*, if it were so raised. On page 9 of his brief counsel refers to some affidavit and exhibit which he quotes, but they are not to be found in any part of the record.

* * * * * * *

A Federal question sufficient to give this court jurisdiction cannot be first raised upon a petition for rehearing in the lower court.

Capitol Nat'l Bk. vs. First Nat'l Bk., 172 U. S., p. 425.

This court has held that even if the Federal question had been specifically and clearly raised in the petition for a rehearing it would not give this court jurisdiction.

Oxly Stave Co. vs. Butter Co., 166th U. S., p. 648.
Citizens' Sav. Bk. vs. Owensborough, 173 U. S., p. 636.
Capitol Nat'l Bk. case, *supra*.

In the latter case this court says:

"The record discloses no Federal question asserted in terms save in the application to the Supreme Court for a rehearing, when the suggestion came too late."

Again, in Simmerman vs. Nebraska, 116 U. S., p. 54, this court held:

"The fact that after the final judgment and in the petition for a writ of error to this court, which seems to have been treated also as a petition for a rehearing, a Federal question was presented, is not enough.

"Susquehanna Boom Co. vs. W. Branch Boom Co., 110 U. S., p. 57:

"As was said in that case, we act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for a rehearing. Such a question is no part of the record on which the judgment rests."

And in Fowler vs. Lamson, 154 U. S., p. 252, it was decided:

"Unless it appear in the record that a Federal question was raised in the State court before the entry of final judgment in the case, this court is without jurisdiction."

EXCEPTION.

The only exception to the doctrine of the above cases which we have been able to find is that where the Federal question is raised in the petition for a rehearing, and that question *decided* by the State supreme court *against the right so claimed*, that then this court will take jurisdiction.

Mallett vs. No. Carolina, 181st U. S., p. 589.

Leigh vs. Green, 193d U. S., p. 79.

Chicago, I., L. & St. L. Ry. vs. McGuire, 196 U. S., p. 128.

In these cases it is held that if the supreme court of the State, in disposing of the petition for a rehearing, did not in any form pass upon the constitutional question raised, and, so far as the record discloses, dismissed the petition for a rehearing without considering the Federal questions, then this court will not undertake to revise the action of the State court.

In the case at bar the State court, in passing upon the petition for rehearing, considered only the question whether the assessment which was made was actually made as a matter of fact under the revenue law of 1890 or was actually made as a matter of fact under the revenue law of 1891, and in its decision (33d Wash., p. 13) the supreme court of Washington said:

"Other questions presented in the petition for a rehearing do not require discussion. We are satisfied with the conclusion reached in the original opinion. The petition for a rehearing is, therefore, denied."

Now, then, the Federal question could not be raised for the first time upon a petition for a rehearing, but if so raised it must have been so raised as to attract the attention of the lower court, and in said court a decision must have been rendered turning to some extent upon the Federal question.

This did not occur, but the decision of the State court was purely upon a question of fact, as the decision itself shows.

Woodward *vs.* Taylor, 33d Wash., p. 13.

And the record here does not include the petition for a rehearing, and this court cannot learn that any Federal question was contained therein.

In Chicago, I., L. & St. L. R. Co. *vs.* McGuire, *supra*, this court said:

"If the supreme court did in fact consider the Federal question the burden was upon the plaintiff to show it. * * * Under such circumstances we decline to review

the constitutional question here. * * * This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other sources of litigation have been exhausted."

This is in accordance with the other decisions of this court, referred to in our original brief, to the effect that not only must a Federal question have been asserted and called to the attention of the lower court, but that the decision must either turn squarely upon the Federal question or the same must necessarily be involved in the decision of the State court; otherwise it will not be considered in this court for the purpose of taking jurisdiction.

Bridge Propr's vs. Hoboken Land & Imp. Co., 1 Wallace, 116.

Citizens' Sav. Bk. vs. Owensborough, 173d U. S., p. 636.

Fullerton vs. Texas, 196 U. S., p. 192.

As this court said in the case of Dewey vs. Des Moines, 173d U. S., page 193:

"It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. In order to be available in this court some claim or right must have been asserted in the court below. A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. A point that was never raised cannot be said to have been decided adversely."

We might cite many other cases from this court, but, bearing in mind our original position, it seems unnecessary to go further.

Admitting that paragraph 11 of the amended complaint attempted to raise a Federal question, this court will recognize the fact that it only recites that the acts of the taxing officers in said amended complaint thereinbefore referred to were of themselves in contravention of the Constitution of

the United States and in nowise pretends to claim that the statute under which officers were acting was insufficient or in anywise contravened the Constitution.

In fact, plaintiff in error says in his Brief, at page 10 thereof:

"We do not contend here that the act itself is not sufficient to give due process, but we do insist that the manner of observance of that act is want of due process. The first element of due process is notice. We do not contend that personal notice is necessary, but whatever the prescribed method of giving it may be that method must be strictly complied with."

And both the trial court and the supreme court of the State of Washington held that upon the *evidence* before the court the statute had been strictly complied with, so that the only question decided by the supreme court of the State of Washington was a question of fact, to wit, that all of the requirements of the statutes of that State had been complied with, and, the statute itself not being questioned by the plaintiff in error, there is certainly no Federal question before this court.

The raising of a Federal question upon a petition for a rehearing is insufficient. But, we again ask, where does the record show that it was raised on a petition for a rehearing? We cannot find any such affidavit as is referred to, nor any petition for rehearing.

Therefore, no Federal question has been properly brought before this court in such a sufficient manner as to give this court jurisdiction.

Therefore, this writ should be dismissed.

* * * * * * *

The second amended complaint in this action is found at page 37 of the transcript. The petition for a rehearing is omitted from the transcript, but the grounds therefor were (Addenda, page —):

First. Surprise, because of former decisions.

Second. That the act of 1891 and not the act of 1890 controlled.

Third. That the act of 1891, which provided for numerical assessments, did not apply to the assessment in issue.

Fourth. That the court erred in holding that the change in method of taxation occurred in 1891.

Fifth. Because the various officers of the State construed the act of 1891 as an alphabetical assessment and not a numerical assessment, and for the supreme court of the State of Washington to hold otherwise would unsettle titles.

Sixth. Because previous decisions had become a rule of property.

Seventh. Because contracts had been entered into based on previous decisions.

Eighth. Because the supreme court of the State of Washington did not understand the facts as proven.

In none of these assignments upon the petition for a rehearing was any Federal question suggested.

In none of the assignments of error in the original brief in the supreme court of the State of Washington was any Federal question suggested, and the rules of that court, as set forth in our original brief, provide that no alleged error or mistake of the superior court will be considered by the supreme court unless the same be clearly pointed out in appellant's brief. Rule 12, p. 9, edition of 1901 (Addenda, page 1).

Nowhere in the brief of appellant in the supreme court of the State of Washington, being the plaintiff in error here, was any such assignment of error made (Addenda, page 1), and nowhere in the argument was it even suggested.

This court will take judicial notice of the rules of the supreme court of the State of Washington.

Hanley *vs.* Donoghue, 116th U. S., p. 1.
Layton *vs.* Missouri, 187th U. S., p. 356.

In this connection we would especially refer this court to the decision in Layton *vs.* Missouri, *supra*, which is a stronger case in favor of the jurisdiction than is the case at bar, because in that case the Federal question was presented in the points and arguments in support of the assignments of error, and, of course, before final judgment and before the petition for a rehearing.

In that case this court says:

"In the supreme court of Missouri, division No. 2, Layton filed his statement and brief, which brief contained an assignment of errors, as required by the rules of that court. Four errors were assigned, the third of which was, that the court erred in refusing to declare that the law under which the defendant was convicted was unconstitutional and void.

"This assignment was followed by points, one of which was, that the law under which the defendant was convicted conflicts with the XIV amendment of the Constitution of the United States, which guarantees to every man the equal protection of the laws. And these points were followed by printed arguments in which it was insisted that the law violated the guarantees of the constitution of the State of Missouri and of the United States, in that it deprives the appellant of his liberty and of his property without due process of law.

"The supreme court of Missouri did not in terms pass on the question whether the act was in contravention of the Constitution of the United States. * * * The decision was strictly a decision sustaining the act's validity when tested by the provisions of the State constitution. * * * The State court cannot be regarded as having decided the

Federal question now suggested, because necessarily involved in the case, if it appears from the record that it was not called upon to do so and that its decision rested upon another ground."

* * * * * * *

Plaintiff in error, after quoting from the opinion of the Supreme Court of Washington in this case, says:

"From the foregoing extracts it will be observed that the only question passed upon by the supreme court of the State was, as we have contended, the *question of notice*, which is always recognized as involving due process of law and, therefore, a Federal question."

But we insist that the only question involved in the decision of the State court was, whether notice was given or was not given under the statute. A pure question of fact. Reference to the decision itself will show this court that the State court simply held that the requirements of the statute in regard to notice had been complied with, and that the State court did not hold, nor pretend to hold, that the statute of itself was insufficient, because the question was not raised in the State court.

Plaintiff in error, plaintiff in the court below, took the position that no notice had been given, and made the same argument which is made in the brief now before this court, namely: That the only notice of the application for a tax deed, was the notice referred to in the affidavit of J. W. McConnaughey, which is set forth on page 22 of the brief of plaintiff in error on the motion to dismiss, when, in fact, the evidence introduced by plaintiff in error, plaintiff in the court below, showed that notice had been given by service of the same upon every tenant and all persons in actual possession of the property, and upon the agent of the plaintiff herself (page 105, Transcript) (it will be remembered that the plaintiff in the court below was Sarah Woodward and her agent was Andrew Knox) as well as due service by publication and the service set forth in the affidavit which plain-

tiff in error takes such particular pains to quote (page 45, Transcript).

This court will further observe that the decision of the lower court was that such notice had been given in accordance with the statute, and this cause in no wise turned in the lower court upon any constitutional question, but only upon the question as to whether proper notice had been given by those required to give notice *under the statute*.

In Smiley *vs.* Kansas, 196 U. S., page 447, this court holds that the determination of a jury on the facts is binding on this court. How much more so is the determination of the supreme court of the State?

* * * * * * *

On page 11 of the brief of plaintiff in error, referring to the decision of the supreme court of the State of Washington in this case, counsel says:

"The whole decision in fact, is based upon the requirement of the statutes of Washington, which guarantee to the citizen notice of assessment and application for a tax deed, and prescribes in detail the manner thereof."

This statement confirms our position, that all reference to notice and want of notice in the proceedings in this case, in the supreme court of the State of Washington, were used in an effort to convince the court that the statutes of the State of Washington had been violated and not that any constitution either of the State or of the United States had been in any wise avoided.

The contention that the statute had been violated was not sustained, but the supreme court of the State of Washington, as well as the trial court, held that, *as a matter of fact*, the statute had been fully complied with, and that, "as a question of fact and of local law," due notice had been given in accordance with the State statute.

It cannot be maintained in the face of the decision of this court in the case of Wood *vs.* Brady, 150 U. S., p. 18, that

the decision of the supreme court of the State of Washington, holding that the revenue proceedings under the laws of 1889 and of 1893 were proceedings *in rem* and not *in personam*, could in any wise raise a Federal question, because this court, in the opinion by Mr. Justice Brown in that case, held squarely to the contrary.

This brings this cause squarely within the decision of this court in Layton *vs.* Missouri, 187 U. S., p. 356, and also the case of Bellingham Bay *vs.* City of Whatcom, 172 U. S., p. 314.

It would seem clear that the question of notice is not always recognized as involving due process of law and, therefore, a Federal question.

Plaintiff in error seems to rely upon the case of Bellingham Bay *vs.* Whatcom, 172 U. S., p. 314, as authority for the statement that the raising of a Federal question in the complaint (answer in that case) is sufficient to give this court jurisdiction. But in that case the Federal question was not only raised in the answer, but was afterwards insisted upon in the supreme court of the State and was fully passed upon by that court.

In that case the court says that the facts presented are similar to those in the cases between the city and the Bellingham Bay Improvement Company, 16th Wash., p. 131, and, on the authority of the cases cited, affirms the judgment of the court below. In the case of New Whatcom *vs.* Bellingham Bay Improvement Co., 16th Wash., p. 131, the Federal question was specifically raised and insisted upon in the State supreme court, and in its decision the court says:

"It is conceded that notice by publication is sufficient, but the objection urged is that the time provided is so short as not to constitute due process of law, and many cases are cited by both sides upon this much litigated question," etc., etc.

It will be observed that all the way through this decision this was the question decided, while in the case at bar no constitutional question seems to have ever occurred to the supreme court of the State.

* * * * * * *

While it seems superfluous to add any additional argument to that already submitted to this court, it is clearly good law that even if a Federal question was raised by the complaint that it was waived in the supreme court of the State of Washington by not being insisted upon. As we have shown, rule 12 of the supreme court of the State of Washington declares that no error nor mistake of the superior court will be considered by the supreme court unless clearly pointed out in appellant's brief (Addenda, page 1), and rule 8 of that court, prescribing the contents and style of a brief, declares:

"Second. Each error relied upon shall be clearly pointed out."

25 Wash., XXXII, XXIX.

These rules have been regularly enforced by the supreme court of the State of Washington in the following cases:

Doran *vs.* Brown, 16 Wash., p. 703.
Sengsfelder *vs.* Hill, 21 Wash., p. 390.
Francioli *vs.* Brue, 4th Wash., 124.
Colton Mercantile Co. *vs.* Duff, 11th Wash., p. 35.
Haugh *vs.* Tacoma, 12th Wash., p. 386.
Perkins *vs.* Mitchell, 15th Wash., p. 407.

And such rules are authorized by the statutes of the State of Washington (Laws of 1893, p. 127; Second Ballinger's Code, sec. 6514).

A similar rule of the supreme court of Missouri was considered by this court in Layton *vs.* Missouri, 187 U. S., p. 356, where it is said:

"As we observed in Jacobi's case, we cannot interfere with the action of the highest court of the State in adhering to the usual course of its judgments."

* * * * * * *

It clearly appears from the record and the decision of the supreme court of the State of Washington that such decision was based upon something entirely foreign to any Federal question; in fact, was based upon other grounds than the constitutional grounds sought to be raised by this writ of error, and this court has held in many cases that where it does not appear that the decision of the State court was based upon constitutional grounds alone nor upon the Federal question upon which jurisdiction is sought to be based, but may have rested upon other grounds, then jurisdiction will not be entertained, but the writ will be dismissed. Certainly this fully appears in the case at bar.

In the case of Capitol National Bank vs. First National Bank (172 U. S., p. 425) Mr. Chief Justice Fuller, writing the decision, says:

"Moreover, even though a Federal question may have been raised and decided, yet if a question not Federal is also raised and decided, and the decision of that question is sufficient to support the judgment, this court will not review the judgment.

"In our opinion no Federal right was specially set up or claimed in this case at the proper time, nor in the proper way, nor was any such right in issue necessarily determined. But the judgment rested on non-Federal grounds entirely sufficient to support it.

"The record discloses no Federal question asserted in terms, save in the application to the Supreme Court for a rehearing, when the suggestion came too late."

In Allen vs. Arguimbau, decided April 3, 1905 (198 U. S., p. 154) this court says:

"If it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction" (citing cases).

In the case at bar it clearly appears that the *only grounds* of the State decision were non-Federal.

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We have examined the brief of plaintiff in error with some diligence in order to find an argument therein made against the dismissal of this action for the lack of a Federal question brought to the attention of the supreme court of the State of Washington and *by it decided*.

The only place we have found in the brief of plaintiff in error in which any attempt is made to assert or insist that the supreme court of the State did pass upon the Federal question is found on page 10 of the brief, and the quotation there given of the decision of the State court is sufficient to show this court that the State court did not at any time attempt to pass upon the constitutionality of any statute.

It is true that it is not necessary that the State court should say in so many words that it is determining a Federal question, but that if the determination of a constitutional question is necessarily involved in the judgment rendered it is sufficient to give this court jurisdiction. But the decision of the State court in this action shows clearly that the State court was only called upon to determine whether, as a matter of fact, the statute of the State had been complied with, and the State court determined that sufficient notice had been given under the requirements of the State statute, thus bringing this case clearly within the decision in Bellingham Bay vs. Whatcom, *supra*.

Nowhere in the assignments of error in the State court, nowhere in the original briefs, nowhere in the decision does it appear that a Federal question was involved, and the only object in attempting to bring in a Federal question in this court is to sustain a jurisdiction which this court has so frequently decided was not within the purview of section 709 of the Revised Statutes.

* * * * * * * *

This now brings us to a discussion of the merits of this case, upon which we enter solely because the same has been entered upon in the brief of plaintiff in error on the motion to dismiss. We do not believe that this court will ever reach the questions to which this part of our brief responds, but we have taken the liberty and trouble of printing the same in order that this court may, if it so desires, be fully advised of the merits of the case now before it. In passing to this branch of our brief we will to some extent reiterate the statement of facts set forth in our original brief, referring to the pages of the transcript, so that this court may be fully advised, and we may, so far as possible, be excused for any neglect on our part.

ARGUMENT ON THE MERITS.

Statement of the Case.

This action arose in the superior court of the State of Washington in and for the county of King, holding terms in the city of Seattle, upon an action brought by Sarah Woodward, for whom were afterward substituted Sarah Woodward and John H. McGraw, as administrator, and in the supreme court, after final judgment, was substituted Henry French, the present plaintiff in error.

There were five separate causes of action stated in the second amended complaint (Transcript, p. 25), which by amendment and elimination were reduced to three causes of action.

The first cause of action, which is the only one upon which a final decision has ever been reached, was to set aside a tax deed standing in the name of H. C. Taylor and purporting to convey certain property in the city of Seattle, which at the time of the assessment of the taxes thereon was the property of Sarah Woodward (Transcript, p. 37).

The grounds for setting aside the tax deed set forth in the complaint were certain defects in the assessment of the tax itself, other defects in the sale, and, finally, defects in the notice of intention to apply for a tax deed and in the deed itself.

The second cause of action was to set aside a quitclaim deed given by Sarah Woodward, whose successor in interest is the plaintiff in error, to the defendant D. F. McConnaughey, which quitclaim deed was for the benefit of all the defendants in error (Transcript, p. 48).

This was a deed from the holder of the original title, but the grounds alleged for setting aside the same are immaterial to this discussion, inasmuch as this action never reached a position where the second cause of action was tried. But it is sufficient to say that such grounds were largely based upon the fact that the plaintiff was an elderly woman, and claimed that she had made the deed under a misapprehension of the surrounding circumstances (Transcript, p. 50).

The third cause of action was to set aside a sheriff's deed to the same property, executed by the sheriff of the county of King to the defendant in error, D. F. McConnaughey, for the use and benefit of all the defendants in error.

The grounds upon which this cause of action was based were that said sheriff's deed had been practically purchased by D. F. McConnaughey under and by virtue of an illegal title, which it was claimed he held through the tax deed and the quitclaim deed of the holder of the legal title, and that therefore he should be held to be a trustee for Sarah Woodward, the original plaintiff in the action (Transcript, p. 54).

The other causes of action are immaterial, so far as this argument is concerned.

* * * * * * *

The trial of this cause was begun in the superior court of the State of Washington for the county of King, and all of the evidence in the record was evidence introduced by the plaintiff, Sarah Woodward, through her attorney, who is now representing the plaintiff in error, and was introduced for the purpose of proving the first cause of action, namely, that the tax title was insufficient and should be set aside.

At the close of the evidence on this first cause of action, plaintiff having, through her counsel, stated that all of her evidence had been submitted so far as that cause of action was concerned (Transcript, p. 119), the trial court rendered judgment in favor of the defendants in error upon the ground that it, the trial court, sustained the tax title as a good and sufficient title under the laws of the State of Washington, and that, it being a sufficient title, there was nothing left to try, so far as the other causes of action were concerned.

In other words, that the defendants in error, having a good title by reason of purchase at tax sale, the facts that they had obtained a quitclaim deed from the holder of the legal title, Sarah Woodward, and had afterward bought the same property at a judicial sale under a judgment, *could add nothing to the sufficient title* which they held by reason of their tax deed.

(It is needless to refer this court to the fact that this same case had been tried in the United States circuit court, an appeal had been taken to the United States circuit court of appeals, and in these Federal courts the same tax title had been sustained, because we are now discussing the writ of error to the supreme court of the State of Washington, in which the Federal case is not involved.) (Transcript, p. 75.)

Appeal was duly taken from the decision of the superior court for King county, State of Washington, to the supreme court of the State of Washington, argument had, briefs submitted, and the decision of the trial court was duly affirmed upon the 19th day of September, A. D. 1903 (Washington Reports, vol. 33, page 1). A petition for rehearing was

filed and an extensive brief presented thereon, counsel for defendants in error were required to respond thereto, and filed, also, elaborate briefs.

The petition for rehearing was denied on February 29, 1904 (Washington Reports, vol. 33, p. 11).

* * * * * * *

No Federal question was ever suggested in the record in this case, except as it may be claimed that it is raised in paragraph 11 of the first cause of action of the second amended complaint, which reads as follows:

"That all the *proceedings* in this paragraph hereinbefore '*enumerated*' was and were in violation of article V and the first section of article 'XV' of the amendments to the Constitution of the United States, and of section 3 of article I of the constitution of the State of Washington, in this: that it constitutes an attempt to deprive plaintiffs of their property without due process of law."

Nowhere else in the record, and never at any time, was it ever suggested that there was any Federal question involved until a judgment had been rendered by the supreme court of the State of Washington overruling the contentions of plaintiff in error, and then a *petition for rehearing* was filed, in which the grounds for a rehearing were set out and specifically enumerated (see Addenda, grounds for rehearing), and no Federal question was even then suggested.

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It would be going outside of legitimate argument to claim in this court that any of the facts set forth in the answer of the defendants in error (Transcript, p. 70) are true, because no evidence whatever was taken in the trial court on behalf of the defendants, but, as this court will see the entire record, it may not be superfluous to suggest that the facts set forth in the answer show that the plaintiff in the case, Sarah Woodward, who now appears by Henry French as the plaintiff in error, had no equity in conscience or morals to enforce,

but was simply seeking through technical grounds to avoid a tax deed properly issued, her own quitclaim deed to the same property, and a sheriff's deed issued upon execution sale in an action to which she was a party; that defendants had paid thousands of dollars for taxes, laborers' liens, and litigation over the property, and finally bought the equity of Sarah Woodward at a fair price (p. 81, Transcript) (Transcript, pp. 75 to 86).

* * * * * * *

Having now stated to this court the facts upon which this action was based, we will proceed to discuss the legal questions involved and upon which the trial court and the supreme court of the State of Washington determined this cause in favor of the defendants in error, and inasmuch as this discussion involves the validity of a tax title we beg the favor of this court to make certain general suggestions in regard thereto.

For years previous to 1886 many State courts had been accustomed to look upon a tax title as a sort of red flag. It was popular to hold any and every tax title void for any and every reason whatsoever, the general theory being that to sustain a tax title was to do a wrong to the holder of the legal title.

The Attorney General of Pennsylvania, in a recent address before the Pacific Coast Bar Association at Portland, Oregon, took the position that in order to understand the decision of any court or the decision of any judge one ought, first, to examine photographs of the judges rendering the decisions, and, second, to study their biography. He eloquently argued that into every decision must be read the character of the man who wrote it, and that from his profile, his ancestors, and his personal history could be learned facts which entered into his decisions when sitting upon the bench.

While not fully agreeing with the views set forth by the learned Attorney General of Pennsylvania, it is unquestionably true that the change of conditions and of views in any

community will work not only a change in the State laws themselves, but a change in the judicial interpretation of the law.

We find that in Illinois among the early decisions, as is stated by counsel for plaintiff in error, the supreme court of Illinois, in its attempt to avoid the effect of a tax title, saw fit to hold that "I. Mayer" was not "J. Mayer," and that an affidavit of notice as being served on "J. Mayer," although actually served on "I. Mayer," was fatally defective, and that evidence could not be introduced to show that the notice was actully served on "I. Mayer," nor could evidence be introduced to show that the use of the letter "J," as representing the name of Mr. Mayer, really meant the letter "I." In other words, that if every act had been actually done which was necessary to make a perfect tax title, every affidavit filed, and every requirement of the statute had been complied with, I. Mayer actually and personally served, yet the use of the letter "J" in place of the letter "I" invalidated the entire transaction (see Gage *vs.* Mayer, 117th Ill., p. 632), and from the time of that decision the supreme court of Illinois, resting upon the doctrine of *stare decisis*, continued to follow the rule of *strictissimi juris* until the decision of Hammond *vs.* Carter, 155th Ill., p. 579, which was decided in 1895.

In the case of Hammond *vs.* Carter the Illinois court took particular pains to inform the reader that it did not overrule the Mayer case, but yet succeeded in holding that "Rubin" was equivalent to "Reuben" and that "Beard" was equivalent to "Baird." Held further that testimony may be introduced *aliunde* to show that actual service was made on Reuben and actual service made on Baird, and that although a return had been made against "Rubin" and against "Beard," yet the service and affidavit were sufficient. Still the supreme court of Illinois did not say that in the Hammond case it reversed the Mayer case. But, in accordance with the views of the Attorney General of Penn-

sylvania, the countenance, conduct, and ancestry of the supreme court of Illinois may possibly have changed, and we are certain that the popular theory of tax title ownership had entirely changed before the year 1895.

In Iowa, as early as 1873, a theory of tax title ownership entirely opposite to that of the supreme court of Illinois had taken effect.

We find that the statute of Illinois, which is similar to the statute of Washington involved in this action, and the statute of Iowa, which is almost identical with the statute of Washington, were both adopted at the same session of the various legislatures, both statutes providing for taxation *in rem* so far as pertained to real estate. But we find that the supreme court of Illinois immediately adopted the rule of *strictissimi juris*, while the supreme court of Iowa, sitting on the other side of the Mississippi river, adopted the opposite rule. The law of Iowa, from which the statute of Washington may have been partially adopted, is found in the Code of 1873, beginning with section 894, and also in McClaine's Revised Code of 1888, beginning with section 1379; and in the case of Nycum vs. Raymond the Iowa court holds that the words "H. Corlis" and "H. Corless" are *idem sonans*, and that a mistake in the notice, using one name for the other, would not invalidate a tax deed. Of course it is plain to any one that the name "Corlis" is not pronounced the same as "Corless" by any person speaking good English, but this decision of the Iowa court simply indicates the different trend of thought which has caused the difference in opinions based upon similar statutes, and we cite this case as one of many decided by the Iowa courts, contemporaneously with the decisions of the Illinois courts, upon statutes practically the same, to show that if the Washington statute was adopted either from the Illinois statute or from the Iowa statute, and carried with it the decisions of the court of the State from which it came, it might be held to be a statute to be construed under the rule of *stricti juris* of the Illinois

court or under the liberal rule of the supreme court of Iowa.

In fact, the Iowa court has held that this statute should be construed liberally, and even two judges of the supreme court of Iowa, dissenting from a liberal opinion, have admitted that although they would not have been so liberal as the majority of the court, yet the statute should be so construed.

This was in the case of Trulock *vs.* Bentley, 25th N. W. R., p. 824, in which Judge Reed, dissenting, says:

"The statute should be liberally construed and the limitation created by it should be held to apply as against all merely technical irregularities in the proceedings."

This decision was filed at about the time when the legislature of the State of Washington adopted the statute which is in dispute in the case at bar, and it is fair to suppose that the legislature of the State of Washington had in mind every decision of the State of Iowa if it is to be supposed that the legislature of the State of Washington had in mind the decisions of the State of Illinois.

Previous to the adoption of the statute of 1889–'90, under which the tax title upon which we rely was obtained, all taxation in the State of Washington had been *in personam*—that is to say, the assessment-roll provided by the various county assessors, under the laws as they existed in the State of Washington previous to 1889, was made up in alphabetical order, each owner of property being assessed *by his name*, the assessment-roll beginning with Aaseth, Abrams, Acers, Adams, Africa, Aggers, etc. This was a purely personal assessment, the property assessed being of minor importance, because every man would look for his assessment in the alphabetical list, where his name would appear in its proper place.

The legislature of 1889–'90, viewing the evil which had resulted from this kind of assessment, determined to make a radical change in the law, and adopted what is known as

the numerical assessment for real estate, retaining, however, the alphabetical assessment for personal property (Transcript, p. 137).

This law for the numerical assessment, or assessment *in rem*, of real estate provided that each tract of real estate in the county, whether lot, block, acre, section, or township, should be assessed as such, and not in the name of the owner nor by any alphabetical arrangement, the object of said law being clearly apparent from the law itself (Session Laws of 1889–'90, chap. 18, p. 530).

The difficulty in the laws of Washington previous to 1889 was that the alphabetical arrangement under which the supreme court of the State had previously decided that the name of the owner was an essential to the assessment of taxes made it extremely difficult to obtain a good and perfect tax title.

Tax titles, therefore, had little value, and taxes in the State of Washington were becoming rapidly delinquent.

It was for the purpose of making tax titles valuable and causing people to invest their money therein, and thus insure the payment of taxes, that the law of 1889–'90 was first proposed and afterward adopted.

If one purchasing land for taxes can be assured of his title, it becomes a favorable source of investment, and if one owning property knows that when he fails to pay his taxes others will pay them and obtain a good title, then property-owners will not allow their taxes to become delinquent.

The result has proven that people will invest in tax titles on the one hand, and that owners of property will pay their taxes on the other.

If a man against whom taxes are assessed feels that a tax title is worthless, he cares little whether his property is offered for sale for taxes; and if the purchaser feels that the title he buys may be worthless, he will not invest his money. To avoid these difficulties the law of 1889–'90 was passed, and the decisions of the State court since that law, beginning

with the case of Coolidge *vs.* Pierce County and continuing down through a line of decisions, including the case at bar, to the case of Rowland *vs.* Eskeland, decided only 30 days ago (advance sheets Washington Reports, vol. 1, p. 461), have resulted in accomplishing the object desired. Taxes are paid more promptly and tax titles have a value.

As we have said, a quarter of a century ago it was a popular notion that courts ought to strain every nerve in an effort to defeat tax titles; that they were wicked and unjust and that the least opportunity should be seized upon to defeat them.

But governments have experienced and courts have learned that taxation is one of the greatest essentials to government; that the attempt to manage governmental affairs without finances is useless; that to obtain those finances it is necessary and honest that every citizen should contribute his proper proportion to the public fund; to obtain such contribution it is necessary that the law should stretch forth a strong and persistent arm and not yield to mere suggestions of severity put forth by those who have failed to perform a public duty.

In these later years the more modern idea of the law has prevailed, which has been well expressed as follows:

"Every citizen must know that he is expected to contribute to the support of the government; he must know that his real property is subject to taxation and that his taxes must be annually paid; he ought to hasten toward the treasurer's office to meet his share of the governmental expense and not be compelled to pay it by the strong arm of the law. To plead ignorance of taxation or that his property has been assessed or that if he does not meet his assessment his property will be sold, is to plead ignorance of the fundamental principles of government."

This was equally well expressed by the supreme court of the State of Washington in its decision in this very case (33 Wash., p. 1):

"The assessment being valid was itself notice to the owner of the realty of the tax charged. * * * And when the notice was given as required by law to all persons having or claiming any interest in the land to appear and object to and defend against the taxes and all proceedings were regular, the court acquired jurisdiction of the *rem* and was therefore authorized to order a sale of the property."

The legislature of the State of Washington saw fit to enact this later theory of the law in the Revenue Act of 1893, under which this tax was foreclosed, using the following language:

"Any judgment for the sale of real estate for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment and could have been presented as a defense to the application for such judgment in the court where the same was rendered."

This change in the views of legislators and of courts has gone a long way towards settling titles, towards enforcing the payment of taxes when due, towards lending confidence to purchasers of property sold for taxes, and towards the prevention of such litigation as the case at bar, where parties knowingly neglected to pay their taxes, believing that if some one else paid them that party would have no remedy and no protection in the law.

* * * * * * *

Previous to the adoption of this law the supreme court o the State of Washington had decided the cases of Bear *vs* Choir, 7th Wash., p. 631, and Vestal *vs.* Morris, 11th Wash., p. 451, and based upon those decisions the United States circuit court had decided the case of Northern Pacific Railroad Company *vs.* Galvin, 85th Fed., 811, holding that taxation in the State of Washington was taxation *in personam*, and the

name of the owner was the particular and material necessity to a proper assessment.

Counsel for plaintiff in error cites these cases to this court, on page 13 of his brief, as if they had something to do with the statute of 1889–'90, and, whether innocently or with deliberate intent, says:

"If, however, the decisions of the State court concerning the validity of the assessment *under the statute complained of* are of any force in this court, we have abundance of authority from that court sustaining the position taken by the plaintiff in error, namely: that the name of the owner is a necessary prerequisite to a valid assessment. It was so held specifically and unequivocally in the following cases:

"Bear *vs.* Choir, 7th Wash., p. 631.

"Vestal *vs.* Morris, 11th Wash., p. 451.

"This rule had been followed and adopted in the Federal court in the following cases:

"Northern Pacific Railroad Co. *vs.* Galvin, 85 Fed., 811.

"State Trust Co. *vs.* Chehalis, 79 Fed., 282."

Inasmuch as we had in two different briefs served upon counsel for plaintiff in error called to his attention the facts in regard to these decisions, it is difficult for us to understand the misstatement contained on page 13 of his brief, from which we have here quoted.

Counsel must know that these decisions are based upon the laws previous to 1889 and have nothing whatever to do with the law of 1889–'90. He ought to know, if he does not know, that in 1889–'90 the legislature of the State of Washington adopted an entirely new and different revenue act from the one referred to in those decisions. He certainly ought to know that in the decision in the case now before this court, which he himself seeks to review by a writ of error, the supreme court of the State of Washington has expressly stated that the law of 1889–'90 entirely changed the method of assessment for taxes in the State of Washington,

and expressly stated that the decisions to which he refers have nothing whatever to do with the present laws of the State of Washington and the law under which the assessment in the case at bar was made.

* * * * * * *

We ask this court to read the cases cited from the supreme court of the State of Washington, and this court will find that the first two cases cited were not "concerning an assessment under the statute complained of" here, but were under entirely different statutes, which provide for an assessment *in personam*, and that the case cited from the 28th Washington, after noticing the principles laid down in the two former cases, holds that the law has since been changed, and that therefore the doctrine of the former cases is no longer the law of the State of Washington.

This court will further find that in the case at bar the supreme court of the State of Washington clearly holds that what was decided in the former cases has no bearing upon this case, and that the United States circuit court fell into an error in following too blindly these early decisions without discovering that the laws of the State of Washington had meanwhile been changed.

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Of a piece with the statements of counsel for plaintiff in error last noticed there is found in his brief the following assertion:

"Previous to the decision in the case at bar it had been uniformly held by the highest court of the State of Washington that the name of the owner was an essential part of the notice, and that an assessment which was not made in the name of the owner was invalid and void" (Brief of Plaintiff in Error, page 14).

Counsel well knew, or ought to have known after trying this case through every court, both Federal and State, that there had never been a decision of the supreme court of the

State of Washington nor of any other court in the State of Washington holding that the name of the owner was an essential part of the assessment nor of the notice of application for a tax deed under the law of 1889–'90 or any subsequent law, and this kind of an assertion in his brief ought to meet with the same disapproval on the part of this court that it does in the minds of the attorneys for the defendants in error.

Because the supreme court of the State of Washington, in the cases of Bear *vs.* Choir and Vestal *vs.* Morris, passing upon the earlier law which provided for taxation *in personam*, rendered a decision in consonance with the statutes then in force, why should counsel for plaintiff in error insist that the rules of construction therein contained should apply to an entirely different statute adopted for the purpose of doing away with those very decisions?

In the case of Wood *vs.* Brady, 150 U. S., p. 18, this court held that whether the proceedings to enforce a street assessment is a proceeding *in rem* or a proceeding *in personam* is one upon which the decision of the supreme court of California is final and is not reviewable by this court, because "in no aspect does the case present a Federal question, and the writ is therefore dismissed."

* * * * * * *

Our duty to our clients requires us to proceed further in reviewing the brief submitted by counsel for plaintiff in error.

Plaintiff in error argues that the erroneous name in the assessment and in the affidavit of service is vital, *because* the records of the county recorder (auditor) showed title in Sarah Woodward.

If this were true, then of what use would the expression "the name of the owner, *if known*," be in the statute or in any statute of any State where a recording act exists?

This clearly means "*if known to the assessor*;" otherwise it means nothing, for all titles can be *known* by a diligent

search of the records. The law did not contemplate any such search and did not provide that the county records should constitute *any such notice*, but expressly says "*if known to him.*"

* * * * * * *

On page 16 of the brief of plaintiff in error it is said:

"The State court held that while it was true that the provisions of the statute had not been complied with (as shown by the uncontradicted facts in the record) still proceedings under that statute are proceedings *in rem* and, therefore, no notice is necessary."

We respectfully submit that this is a perversion of the decision of the State Supreme Court, for, on the contrary, that court said, quoting from its own decision in the case of Coolidge vs. Pierce County, 28th Wash., p. 95:

"In a tax levied in 1897 upon realty belonging to the plaintiff, under the law of 1895 * * * the tax is charged upon the land and the proceedings are *in rem;* it was therefore competent for the legislature to provide, as it did, that *the land should be assessed* by suitable descriptions *in numerical order*, at a certain time, and the assessment-roll made up and filed at a certain time, and *such proceedings may be due notice* to the owner of such realty of the tax charged. * * * The assessment being valid *was itself notice* to the owners of the realty of the tax charged, and *when the notice was given* as required by law to all persons having or claiming any interest in the land to appear and object to and defend against the taxation, and all proceedings were regular, the court acquired jurisdiction of the *res* and was, therefore, authorized to order a sale of the property. * * * It is next urged that there was no notice to the owners of the expiration of the period of redemption and of the application for a deed. This point is based largely upon the point already considered. It is shown by the record that *notice as required by law was given* to all the tenants and occupants of the property, and the person in whose name it was assessed. That the owner, Mrs. Woodward, was a non-resident of the State, and that a notice was given to her agent, in Seattle, also to the person actually in possession, and was also pub-

lished. This was all that was required by section 127 of the Laws of 1893, p. 380."

See 35 Wash., p. 271.

So it will be seen by this court that instead of deciding, as counsel for plaintiff in error asserts, that no notice was necessary, the supreme court of the State of Washington, sustaining the decision of the trial court, held that if a notice was necessary, then, as a matter of fact, such notice was given in each, every, and all respects as required by the law, and more, too.

* * * * * * *

In the case of Williams vs. Pittock, 35th Wash., p. 271, a case decided later by the supreme court of the State of Washington, every contention made by us in the case at bar is upheld. The court there says:

"Tax proceedings under our statutes are purely *in rem*. * * * It would appear that the actual name of the real owner is made no more essential in the proceedings to foreclose than in the assessment. The whole procedure, including the assessment, foreclosure and sale is for the purpose of establishing and enforcing a lien for public revenue, which, under the policy of this State, is chargeable *to the property only* and not personally to the owner. It is the land itself with which the State is concerned, and its dominion over the land for revenue purposes exists without regard to who may be the owner. All owners know that such is the fact and that the power of taxation will be exercised each year. * * * If the property is assessed to an unknown owner, or to one not the real owner, the holder of a certificate should not be required to determine in advance who may be the real owner. That may be a difficult matter and may often be the subject of serious dispute."

And then the supreme court of Washington quotes from McQuade vs. Jaffray, 50 N. W., 283, and further bases its decision upon the decision of this court in Leigh vs. Green, 24th Supreme Court Rep., p. 390 (193 U. S., p. 79).

If there could be any doubt in the minds of this court as to the grounds upon which the decision of the supreme court of the State of Washington in the case at bar was founded, that doubt would be set aside after reading the case of Williams *vs.* Pittock, 35 Wash., p. 271; and again, in the case of Rowland *vs.* Eskeland, decided only thirty days ago (advanced sheets Wash. Repts., vol. 1, p. 461), the court says:

"As we have repeatedly held, a tax foreclosure proceeding in this State is a proceeding against property, and is in no sense an action against the person of the owner of such property. Its purpose is to charge such property with its just proportion of the public revenues, and the State's dominion over the land exists for that purpose without regard to its ownership. When, therefore, the legislature provided that the lien for taxes might be foreclosed in the courts against the person to whom the land was assessed, whether that person was or was not the owner of the property, it acted within its powers, and the person foreclosing acquires a legal title by a proceeding as the statute directs" (citing Woodward *vs.* Taylor, 33 Wash., 1; 73 Pac., 785; 75 Pac., 646; Washington Timber & Loan Co. *vs.* Smith, 34 Wash., 625; 76 Pac., 267; Williams *vs.* Pittock, 35 Wash., 271; 77 Pac., 385; Morrison *vs.* Shipman, 37 Wash., 171; 79 Pac., 632; Spokane Falls, etc., R. Co. *vs.* Ahitz, *supra*; see also Carson *vs.* Titlow, 38 Wash., 196; 80 Pac., 299; Anderson *vs.* Turati, 39 Wash., —; 81 Pac., 557).

"It follows that the actual ownership of the property is immaterial in these foreclosure proceedings, so long as the owner described in the certificate, and to whom the property was assessed, is given notice of such proceedings."

And it would be necessary for this court, in order to reverse the decision of the supreme court of the State of Washington in the case at bar, to hold that the supreme court of that State had an entirely erroneous view of the revenue act of 1889–'90, and that the same was not an act providing for taxation *in rem*, although the legislature adopted the same for that express purpose.

* * * * * * *

Plaintiff in error cites the case of Marx *vs.* Hanthorn, 148 U. S., p. 172, a case based upon the Oregon statute, for the purpose of leading this court to believe that it has already decided that assessments under a statute similar to the statute of Washington are not assessments *in rem*, but this court will readily see that the assessment there considered was an assessment *in personam*. The personal property of the taxpayer was required by the Oregon statute to be sold before resort could be had to the real estate.

A similar statute was in force in Washington at the time when the cases of Bear *vs.* Choir and Vestal *vs.* Morris, hereinbefore referred to, were decided; but, as we have heretofore shown, the law of the State of Washington upon this subject was afterward changed and real-estate assessments became assessments *in rem*, and the decision of this court in Marx *vs.* Hanthorn in nowise determined any question involved in this case.

* * * * * * *

This being a case arising under a statute providing for assessment *in rem* and a sale of the *res* in order to collect the taxes, the statute itself provided for a certain notice to be given where the owner of the property was a non-resident, as she was in the case at bar, such notice to be given by publication, and such publication was had (Transcript, p. 123); but in addition to this it was provided that notice might be given of the application for a tax deed, either by publication or by serving notice upon the tenants, and such notice *was given* in addition to the publication (Transcript, p. 105), and the defendants in error went further and gave personal notice to the local agent, resident of the State of Washington, of the actual owner of the property (Transcript, p. 105). As the supreme court of the State of Washington held, this certainly was not only sufficient notice, but more than sufficient.

The notice of the application for the judgment described in section 96 of the statute in proceedings similar to the

statute under consideration has been repeatedly held by this court to be due process of law.

Merchants' Bank *vs.* Pennsylvania, 167 U. S., p. 461.
King *vs.* Mullins, 171 U. S., p. 404.
Leigh *vs.* Green, 193 U. S., p. 79.
Hodge *vs.* Muscatine County (February 15, 1905), 196 U. S., 276.

In King *vs.* Mullins, *supra*, this court says:

"If this be true, it would seem to follow necessarily that if the statutes of the State, in connection with the constitution, gave the tax-payer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them on the land books, there is no ground for him to complain that his property has been taken without due process of law. Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all of the principles involved in due process of law, as applied to proceedings strictly judicial in their nature, apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character. * * * It thus appears that under the statutes of West Virginia, in force after 1882, the owner of the forfeited lands had a right to become a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him upon terms that were reasonable, from the forfeiture of his lands."

In the case of Tyler *vs.* Judges of the Court of Registration, 175 Mass., p. 71, Mr. Justice Holmes, then Chief Justice of Massachusetts, in passing upon the question of the Torrens system of registration, said:

"Looked at either from the point of view of history or the necessary requirements of justice, a proceeding *in rem* dealing with a tangible *res* may be instituted and carried to judgment without personal service upon claimants within

the State or notice by name to those outside of it and not encounter any provision of either constitution.

"Jurisdiction is secured by the power of the court over the *res*."

In the case of Leigh *vs.* Green, *supra*, Mr. Justice Day writing the opinion, this court speaks approvingly of the language of Chief Justice Holmes and further says:

"A notice which permits all interested who are 'so minded' to ascertain that it is to be subjected to sale to answer for taxes and to appear and be heard, whether found in the jurisdiction or not, is due process of law."

In the recent case of Hodge *vs.* Muscatine County (106 U.S., p. 276) Mr. Justice Brown, writing the opinion, holds that the mere carrying on of the business of selling cigarettes upon the premises of a non-resident owner of the real estate is sufficient notice to the owner of the property of the laws of Iowa by which the real property may be subjected to a lien for a license tax upon cigarette dealers. In other words, the doing of the business upon the premises is notice, and the owner of the real estate is bound to know the law.

With how much more force is the argument made that the owner of real estate is bound to know that his or her property will be taxed, and that the assessment itself is the notice in any State where taxation is *in rem*, as it has been held in the State of Washington.

So, in Washington, after the lands became delinquent, the owner of the land had a right to become a party to a judicial proceeding, after a notice published or served personally upon the tenants or occupants of the property, as provided by the statute, and make his defense to the taxation sought to be enforced against his lands, and the court had power to give him such relief as the facts warranted. Section 96 of the Laws of 1893, at page 366, provides for the application of the county treasurer to the superior court for a judgment against the lands taxed; provides for notice thereof and its

publication, and section 105 of the same act provides that the court shall examine the list, and if defense be offered by any person interested the court shall hear and determine the matter and pronounce judgment as the right of the case may be, thus offering the owner as fully due process of law as could be given in any other l gal proceeding.

Hodge *vs.* Muscatine County, *supra.*

In the case of Leigh *vs.* Green, 193 U. S., p. 79, under a statute very similar to the statute of the State of Washington, this court held that the proceedings to collect the taxes were proceedings *in rem*, and that a notice published to the persons named "all persons interested in said real estate" was notice to the holder of an attachment lien upon the land, although he was not named in the notice and could only be brought into court as one of the persons comprehended in the term "all persons interested in said real estate," and that such proceedings, being proceedings *in rem*, constituted due process of law.

Section 101 of the Laws of 1889–'90 of the State of Washington provided (Addenda, page) for exactly such a notice as is quoted in Leigh *vs.* Green, and it has never been contended in the trial court, nor in the supreme court of the State of Washington, nor do we understand that it is contended in this court, that the notice required by the statute was not duly given as required by law.

It is also contended that the notice of application for a tax deed was not given, and the supreme court of the State of Washington has held upon the facts to the contrary, finding, *as a matter of fact*, the proofs in the record sufficient to show that such notice was duly given (Woodward *vs.* Taylor, 33d Wash., p. 10). And the record itself shows that such notice was duly given by publication, by personal service on the tenants, and all occupants of the property, and by personal service upon the agent of the owner, who was the original plaintiff in this case (Transcript, pp. 140, 141).

Counsel for plaintiff in error, upon page 19 of his brief, after quoting from page 928 of Cooley on Taxation, says:

"The supreme court of the State of Washington in a decision rendered since the decision in the case at bar adopts this same rule. State *vs.* McConnaughey, 33d Wash., 571."

A mere reference to the decision will show that the supreme court of the State of Washington does not adopt the same rule in relation to taxation and that the case referred to has nothing whatever to do with it. The case of State *vs.* McConnaughey referred to was an action where the county commissioners attempted to sell real property belonging to the county; not any case whatever in regard to taxation, but mere real property which by some process or other had become the actual property of the county of King. The State law provided that the land should be described in the notice of sale, and the notice of sale which was published did not describe the property at all.

As the court said:

"Evidently the object of the law is to secure the best price possible for the property of the county offered at public sale, and that the public may know the *particular property* on which bids are to be invited at the time and place of sale."

And in another place the court says:

"The order of the commissioners directed the lots in block 7 to be advertised and offered for sale, which the county auditor failed to do, but instead, noticed for sale lots in a different block. This the auditor had no authority to do."

In other words, there was no notice given of any kind of the sale of any lots in block 7, and the attempt to sell them under a statutory right of sale, without notice, was absolutely illegal and void.

It is unnecessary for us to review the various authorities cited by counsel for plaintiff in error in regard to tax sales under various State statutes.

Wherever such assessment was in *personam*, then the courts seem to have uniformly held, as did the supreme court of the State of Washington in the early cases, under the Washington statute providing that taxation should be *in personam*, that notice to the *person* to be assessed is essential. Such were the Indiana, Virginia and Texas cases referred to.

But when, as in the State of Washington, the method of taxation was entirely changed and the numerical assessment adopted, which is commonly known as assessment *in rem* the courts have properly held, as has the supreme court of the State of Washington, that it is the land which is assessed and not the person, and that when the statute has been reasonably complied with, *so as to bring the land* under the jurisdiction of the court, all persons are bound with notice that it is one of the functions of government to impose taxes.

The rule is based upon the same reasoning and is equally reasonable with the rule that all persons are bound to know the statutes of their own State.

When then an assessment had been made and properly made, the various notices required by the statute had been published, as required by law, setting forth a proper description of the real estate taxed, when subsequent notice had been given of application for the tax deed, not only by publication, as required by law, but upon the tenants of the real property and also upon the agent of the owner herself, when after such notice of application for tax deed a tax deed had issued, and the owner had given her own quitclaim deed to the purchaser at the tax sale, what more could be required to make a good tax title?

* * * * * * *

Upon page 23 of the brief of plaintiff in error, upon the motion to dismiss, counsel attempt to make their own testimony, which is found in the transcript at page 105, the testimony of the defendants. This court will observe that they had their own witness upon the witness stand, namely, Mr.

J. W. McConnaughey, the county treasurer of the county of King, and State of Washington, and they were seeking to offer in evidence the notices which had been given in proof of compliance with the statute. The object of introducing this testimony was undoubtedly, on the part of plaintiff in error, to show that the notices were insufficient. In order to identify the notices which were being offered, we interrupted, and asked of their witness what these papers then being offered in evidence really were, and it was their witness who testified that these were notices served upon the agent of the plaintiff in error, notices served upon all the tenants of the property, in addition to the notice by publication, and they themselves showed by this witness full compliance with the statute. It was not our "attempt to cure the record," but the evidence of plaintiff in error, and for them now to attempt to raise an objection to the same, in this court, will be without weight.

* * * * * * *

Again, on pages 24 *et seq.*, counsel for plaintiff in error takes the liberty to inform this court that "The *Washington statute* was adopted by the circuit court of appeals in the case of Coulter *vs.* Stafford, 46 Fed., 564, and the construction there given was adopted and approved by the supreme court of Washington in Herrick *vs.* Niess, 16 Wash., 74," but counsel for plaintiff in error neglects to inform this court that the statute under adjudication in those cases was not the statute in the case at bar.

Why this continual semi-concealment we do not know. In the case of Coulter *vs.* Stafford and the subsequent case of Herrick *vs.* Niess there were no laws under consideration except the statutes of 1881 and of 1886, which were repealed by the statute of 1889–'90, under which the decision of the case at bar occurred, and these decisions were based upon the fact that these prior statutes referred to did not contain the curative clauses contained in the Statutes of 1889–'90

and the subsequent statute of 1893, under which our deed was obtained.

* * * * * * *

It is difficult to answer all the propositions which counsel for plaintiff in error has introduced into this case in this court. The case was tried in the superior court of King county, Washington, upon the theory that the law of 1889 governed and had not been complied with in assessing the taxes and in giving the notice of the application for a deed. The trial court found the facts all against the plaintiff there, plaintiff in error here, and an appeal was taken to the supreme court of the State and briefs filed upon this same theory, the case tried *de novo*, and decided by the supreme court of the State of Washington, upon the facts as shown by the record, against the plaintiff, appellant there. After being completely defeated upon the theory submitted to the trial court and afterwards to the supreme court, plaintiff in error filed a petition for a rehearing and in that petition for a rehearing took an entirely new ground, namely, that this tax was not levied under the law of 1889–'90, but was, in fact, levied under the law of 1891, which allowed for taxation *in personam*, where the assessing officers had not already made out assessment lists *in rem*. Numerous affidavits, letters, etc., were submitted on the petition for a rehearing, and the supreme court of the State found without any difficulty that this new proposition of law and of fact was without any foundation whatever, and that the actual taxation had taken place under the law of 1889–'90, which provided for taxation *in rem*.

Counsel for plaintiff in error, appellant in the court below, attempted to introduce still another new issue or proposition of law in his petition for a rehearing by assuming as a major premise that the law of 1889–'90 was adopted from the statutes of Illinois and nowhere else, and therefore the Illinois cases controlled, and he has carried this argument into his brief in this court; but it was readily shown that

the statutes of Iowa were equally akin to the statute of Washington, if not more so, and that the supreme court of the State of Iowa, in the various cases of Rowland *vs.* Brown, 37 N. W. Rep., 403; Stull *vs.* Moore, 70 Ia., 149; Nycum *vs.* Raymond, 34 N. W. Rep., 819; Trulock *vs.* Bentley, 25 N. W. Rep., 824; Irwin *vs.* Burdick, 44 N. W. Rep., 375; Hillyer *vs.* Farman, 65 Ia., 227; 21 N. W. Rep., 578, and other cases had held that this statute provided for taxation *in rem*, and that many of the better general authorities, including decisions of this court, were exactly along the line of our argument in the case at bar.

To hold that a legislature necessarily adopts all of the decisions of every court of every State from which a statute may come is, as a matter of fact, to hold an absurdity, for the legislature probably has no knowledge of the decisions affecting any statute or part of a statute which the legislature may adopt from some other State, and most likely does not know from what State the statute comes; but if such rule of construction would control, then it is equally as clear that the Iowa decisions have been adopted by the legislature of the State of Washington as the Illinois decisions, and the supreme court of the State of Washington has taken the position:

"This court will not blindly follow the construction given a particular statute by the court of the State from which we borrowed it, when the decision itself does not appeal to us as founded on right reason."

Ancient Order of Hibernians *vs.* Sparrow, 74 Pac. Rep., 119.

Tilton *vs.* O'Shea, 31 Wash., 514.

And the supreme court of the State preferred to follow the decisions of this court similar to that of Witherspoon *vs.* Duncan, 4 Wall., 210, and the authority of Black on Tax Titles, second edition, sections 110, 137, as well as the decisions of the Iowa courts.

CURATIVE ACTS.

This court will remember that this sale was made under the laws of 1893, the assessment having been made under the law of 1889-'90, and we have printed in the Addenda, pages — and —, the provisions of the statute of 1893 curing defects in the assessment, in the notice of tax sale and the section which provides as to the conclusiveness of the tax deed. Section 105, page — of the Addenda, expressly provides that no assessments of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax-lists or assessment-roll * * * or on account of a property having been charged or listed in the assessment or tax list *without name* or any other name than that of the original owner, etc., etc.

Section 132 makes the deed issued by the county treasurer *prima facie* evidence of all of the facts necessary for the granting of the same, and further provides that any judgment for the sale of real estate for delinquent taxes shall estop the party from raising objections thereto which existed at or before the rendition of such judgment and could have been presented as a defense to the same, further saying:

"And as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings existing, except in proceedings where the *tax or assessments have been paid* or the real estate was not liable to the tax or assessment."

Could any language be used to more fully show the intent of the legislature that this taxation was *in rem*; the judgment against the property; the effect of the judgment after it was rendered?

Black on Tax Titles, second edition, sections 177, 224, says:

"In regard to the scope of the estoppel, it is held that the tax judgment, while not reversed, is conclusive upon the

owner and the land, not only as to the matters actually decided by the court, but also as to all questions or objections that might have been raised against its rendition. * * * It is also conclusive of the validity of the assessment, and the assessor's books are not admissible to show its invalidity, and in a case where the formalities required by law for the collection of taxes appear to have been complied with, and a sale of a lot of land is made by the proper officer upon a judgment obtained by *a proceeding in rem* against the property upon which the tax was due, the purchaser cannot be dispossessed, so it is held, by the owner of the property at the time the tax was levied, on the ground that the land was erroneously assessed in the name of one who was not proprietor."

As to the policy and competency of this legislation and the position which courts take in upholding the same, Black in his work on Tax Titles, chapter 31, 116, second edition, goes into detail, and section 487 of that chapter covers the point at issue, while in section 490 he says:

"Statutes intended to cure defects and irregularities in tax proceedings should receive an effective construction at the hands of the courts, and should be so interpreted, if possible, as to carry into operation all the designs which the legislature may reasonably be supposed to have had in mind at the time of the enactment."

* * * * * * *

Since this brief was prepared for the printer and on November 4 the attorney for plaintiff in error has filed a brief on the merits, but has not served the same, although demand for service had previously been personally served upon him.

There is nothing particularly new in the so-called brief on the merits, and our foregoing brief may be considered as an answer thereto. But there are a few misstatements or errors in said brief, to which we wish to call attention.

On page 7 thereof the attorney for plaintiff in error says:

"That the provisions of the statute in the particulars mentioned were not followed by the taxing officers, is not in dispute."

On the contrary, it is in dispute, and the supreme court of the State of Washington expressly found that the provisions of the statute in the particulars mentioned were substantially followed by the taxing officers.

On page 15 of said brief counsel says that the State supreme court arrived at the conclusion * * * that in such a proceeding no notice to the owner was necessary, notwithstanding the provision of the statute.

The State supreme court arrived at no such conclusion whatever, but simply held that notice *of the assessment* was unnecessary, the assessment itself being notice, and then held that sufficient notice was given, as is shown by the evidence in the transcript in this case.

Beginning with page 16 of said brief, counsel argues that the rule of personal notice and personal assessments had become a rule of property in the State of Washington, and cites many decisions in the brief, but again fails to inform this court that each and every one of the decisions upon which he relies were under an entirely different statute, which was expressly repealed by the law of 1889–'90.

Baer vs. Choir, 7th Wash., 631, and Vestal vs. Morris, 11th Wash., 451, were decided long before the statute of 1889–'90 was adopted.

Coolidge vs. Pierce County, 28th Wash., 95, was expressly limited to the statute of 1895, and in Woodward vs. Taylor, 33d Wash., p. 1, the supreme court of Washington so states.

In The Northern Pacific Railway Company vs. Galvin, 85 Fed., 811, Judge Hanford expressly states that his opinion is based upon the decisions of the supreme court of Washington in Baer vs. Choir, 7th Wash., 631, and Vestal vs. Morris, 11th Wash., 451, which were decisions upon a statute repealed by the statute involved in the case at bar. (See page 20 of the brief of plaintiff in error on the merits.)

Why plaintiff in error cites these cases to this court as in anywise constituting a rule of property under a statute subsequently adopted we certainly cannot understand.

All of the decisions, beginning with Woodward vs. Taylor, 33d Wash., p. 1, which are cited by plaintiff in error on page 23 of his brief are consistently unanimous in accordance with our argument and the decision in Woodward vs. Taylor. In other words, beginning with the adoption of the statute of 1889–'90, the legislature and the supreme court of Washington determined that taxation against real estate was *in rem*.

* * * * * * *

On page 41 of the brief referred to counsel refers to the case of Coulter vs. Stafford, 56 Fed., 564, and to the case of Herrick vs. Neiz, 16th Wash., p. 74, and says that these cases refer to *the statute*, but does not call the attention of this court to the fact that these cases were based upon the statute of 1886, repealed by the statute of 1889–'90, which is the statute involved in this case.

On page 51 of said brief counsel asks the question whether service by publication was authorized, but omits to state that his complaint shows that the plaintiff was a non-resident; that his own evidence shows that service by publication was had (p. 43 of the brief); that service on the persons actually occupying the property was had (pp. 105 and 130 *et seq.*, Transcript); that the agent of plaintiff herself was duly served with the notice (pp. 105 and 131 of the transcript), and that the plaintiff herself had actual notice and executed the deed to the defendant H. C. Taylor for this identical property after due consultation with her attorney (p. 16 of the transcript).

* * * * * * *

By a repeated ringing of the changes upon the Illinois decisions previous to 1895, when the case of Hammond vs. Carter (105 Ill., p. 579) was decided, and by constantly claiming that the statute of the State of Washington was taken

from the Illinois statute, of which there is no evidence whatever, counsel for plaintiff in error endeavors to make a case.

We think our brief in answer to his original brief is sufficient.

Conclusion.

In conclusion, this court will observe that the real question upon which this case has turned in every court in which it could possibly be raised has been the question whether the statute of 1889–'90 enacted by the legislature of the State of Washington did, as a matter of law, change the method of taxation in that State from the alphabetical assessment to a numerical assessment, or, in other words, from a personal assessment to an assessment *in rem*. All the courts so far passing upon this case have held that such was the effect of the new law.

Then the question of fact arose, Had that statute been reasonably complied with? and all of the courts which have passed upon the question in the case at bar have held, *as a matter of fact*, that the necessary acts to comply with that statute have been complied with in the tax title now under discussion.

The constitutionality of the statute itself has never been called in question, and therefore, as we have contended heretofore in this brief, the statute being constitutional; the statute providing for taxation *in rem*; the *res* being properly brought under the jurisdiction of the trial court in the tax proceeding; a judgment against the *res* having properly been entered; the land properly sold; good and sufficient, and more than sufficient, notice having been given of the application for the tax deed; the agent of the plaintiff herself, so denominated as her agent in her own complaint, having had full notice, and everything having been done that could reasonably be required, a good and sufficient tax title was made in the defendant in error Taylor. All of the facts

necessary to sustain the same have been found by every court in favor of the defendants in error, and this court will not review them.

We submit that the writ of error should be dismissed or at least the judgment of the supreme court of the State affirmed.

Very respectfully,

JEFFERSON CHANDLER,
WM. H. BRINKER, AND
RICHARD SAXE JONES,
Attorneys for Defendants in Error.

ADDENDA.

Statutes, etc., Referred to in this Brief.

I.

Rule of the Supreme Court of the State of Washington as to Assignment of Errors (Rule 12, p. 9, ed. of 1901).

"No alleged error or mistake of the superior court will be considered by the supreme court unless the same be clearly pointed out in the appellant's brief, provided that the objection that this court has no jurisdiction of the appellant may be taken at any time."

Decisions Requiring an Assignment of Error Under the Above Rule.

Doran *vs.* Brown, 16 Wash., 703.
Songsfelder *vs.* Hill, 21 Wash., 390.
Francioli *vs.* Brue, 4th Wash., 124.
Colton Mercantile Co. *vs.* Duff, 11 Wash., 35.
Haugh *vs.* Tacoma, 12 Wash., 386.
Perkins *vs.* Mitchell, 15 Wash., 407.

Assignment of Errors by Plaintiff in Error (Appellant in the Court Below.)

Pages 15, 16, and 17 of appellant's brief:

Proceeding now to a particular consideration of the errors committed by the court appellants say that the court erred—

I.

In sustaining the demurrer of the defendants to the fourth cause of action of the first amended complaint (Record, page 41).

II.

In denying the motion of plaintiffs to strike from the answer of defendants a certain portion thereof in so far as said motion relates to the third, fourth, and fifth affirmative defenses set forth in the answer of said defendants (Record, p. 107; also p. 113).

III.

In denying plaintiff's motion to strike the answers of the defendants and for judgment against all of the defendants for failure to answer the interrogatories submitted by plaintiff (Record, pp. 129–129½).

IV.

In denying plaintiff's motion for leave to amend the complaint by interlineation (Record, p. 151; also S. of F., p. 3).

V.

In permitting defendants to amend their answer at the time of the trial, setting up the plea.

VI.

In refusing to permit plaintiffs to show that the defendants failed to pay the delinquent taxes for the years 1894, 1895, and 1896 previous to the issuance of the alleged tax deed (S. of F., pp. 38–40).

These are all the assignments of error in the brief of appellant.

Motion for Rehearing and Grounds Thereof.

Come now the appellants and move this court to grant a rehearing of this appeal, and in support of said motion show to the court as follows, to wit:

Grounds for Rehearing.

First. Because the decision comes as surprise on account of the overruling of Coolidge vs. Pierce County, and Railroad Company vs. Galvin, since appellants relied upon those decisions, and for that reason alone deemed it unnecessary to discuss the merits of the question, and, further, because this case was prepared and conducted under the authority of those decisions.

Second. Because this court has entirely overlooked the revenue act of 1891, and has inadvertently held that the assessment of appellants' property was made under the act of 1890 instead of the act of 1891.

Third. Because the act of 1891 specifically provides that the "numerical assessment" shall not apply to the year 1891, which was the year that appellants' property was assessed. Not the year 1890, as the opinion states.

Fourth. Because the court erred in holding that the change in the method of taxation from a proceeding *in personam* to a proceeding *in rem* took place in 1890.

Fifth. Because the various assessing officers in the State, acting under the direction of the attorney-general's office, construed the law otherwise, and real property for the years 1890 and 1891 was, in most counties, assessed alphabetically and not numerically, and if the decision in this case is allowed to stand it will create a great unsettling of titles in this State.

Sixth. Because the decision in Railroad Company vs. Galvin and Coolidge vs. Pierce County established a rule of property in this State.

Seventh. Because this court in considering the question of notice of the expiration of the period of redemption has inadvertently misunderstood what the record in the tax proceeding shows concerning that notice.

These are all the grounds set forth for a rehearing and are found on pages 3 and 4 of the brief of appellant in the supreme court of the State of Washington upon her motion for a rehearing.

Statutes.

The Session Laws of the State of Washington, 1889-'90, chapter 18, beginning on page 530, title, "Revenue and Taxation."

SECTION 2. Where property for the purpose of taxation shall be construed to include the land itself, etc.

SECTION 6. All real property in this State subject to taxation shall be listed and assessed every even-numbered year, with reference to its value on the first day of April preceding the assessment, and all real estate becoming taxable any intervening year shall be listed and and assessed with reference to its value on the first day of April of that year. Personal property shall be listed and assessed annually with reference to its value on the first day of April.

SECTION 7. Personal property shall be listed in the manner following:

First. Every person of full age and sound mind, being a resident of this State, shall list all his moneys, etc., etc.

SECTION 49. The assessor shall make out in the real property assessment book, *in numerical order*, complete lists of all lands or lots subject to taxation, showing the names of the owners, *if to him known*, so stated opposite each tract or lot, the number of acres and the lots or numbers of lots or blocks included in each description of property, etc.

SECTION 85. On receiving the tax books from the county

auditor the treasurer shall give notice by publication in some newspaper having general circulation in the county, once in each of three successive weeks, that the assessment books have been turned over to him for the collection of taxes thereon.

SECTION 99. Upon the first day of April of each year the county treasurer shall return to the county auditor the several tax lists in his hands, having compared the same with his duplicate receipts on file in the auditor's office, and written opposite the amount of each tax so receipted for the word "paid," and the number of the treasurer's receipt given in discharge of such tax, *which tract or lot of real property* against which the taxes remain unpaid shall be deemed delinquent.

SECTION 101. The clerk shall * * * deliver to the county auditor a copy of the list * * * and attach thereto a notice which may be substantially in the following form:

STATE OF WASHINGTON, } ss:
County of King, }

Superior Court, Judicial District.

The State of Washington, to all persons, companies or corporations who have or claim any estate, right, title or interest in, claim to, or lien upon any of the several pieces or parcels of land in the list hereto attached described.

* * * You and each of you are hereby required to file in the office of said clerk, within twenty days after the last publication of this notice, your answer in writing, setting forth any objection or defense you may have to the taxes and the penalties, or any part thereof, upon any piece or parcel of land described in said list, in, to, or on which you have or claim any estate, right, title, interest, claim or lien, etc.

SECTION 102. The county auditor shall cause said notice and list to be published once in each of four consecutive weeks in some newspaper of general circulation, etc.

SECTION 103. When the last publication shall have been made the notice shall be admitted to have been served and *the court to have acquired full and complete jurisdiction to* enforce against each piece or parcel the amount in said published list described, the taxes, etc.

SECTION 105. Provides for the appearance and answer of any person in interest, setting forth his defense.

SECTION 108. Provides for a judgment.

SECTION 109. If all the provisions of law in relation to the assessment and levy of taxes shall have been complied with, of which the list filed with the clerk shall be *prima facie* evidence, then judgment shall be rendered for such taxes and the penalties and costs. But no omission of any of the things by law provided in relation to such assessment and levy, or anything required by any officer or officers to be done, prior to the filing of the list with the clerk, shall be a defense or objection to the taxes appearing upon any piece or parcel of land, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that the taxes against such piece or parcel of land have been partially, unfairly, or unequally assessed, etc.

SECTION 110. The judgment which the court shall render shall be final, etc.

SECTION 112, *et seq.*, provides for the tax sale and certificate of purchase.

SECTION 115. Such certificate, or the record thereof shall in all cases be *prima facie* evidence that all of the requirements of the law with respect to the sale have been complied with, and of title in the grantee therein after the time for redemption has expired, and no sale shall be set aside or held invalid unless the party objecting to the same shall prove either that the court rendering the judgment, pur-

suant to which the same was made, had no jurisdiction to enter the judgment, or that after the judgment and before the sale such judgment had been satisfied, or that notice of sale as required by this act was not given, etc.

SESSION LAWS OF 1893 UNDER WHICH THE DEED INVOLVED IN THIS CASE ISSUED.

The provisions for assessment under the law of 1893 are practically the same as under the law of 1889–'90.

SECTION 105. The court shall examine said list, and if defense be offered by any person interested in any of said lands or lots, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be, etc. In all judicial proceedings of any kind for the collection of taxes, assessments and the penalties, interest and costs therein, all amendments may be made which by law can be made in any personal action pending in such court, and no assessments of property or charge for any of said taxes shall be considered illegal *on account of any irregularity in the tax-lists or assessment-roll*, or on account of the assessment-rolls and tax-list not having been made, completed and returned within the time required by law, or on account of a property having been charged or listed in the assessment or tax list *without name or any other name than that of the original owner*, and *no error or informality in the proceedings of any of the various officers* connected with the assessment, levying, or collection of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof, etc.

SECTION 106. Provides for appeals to the supreme court, the succeeding sections providing for sale and forfeiture, etc.

SECTION 121. Provides for redemption.

SECTION 127. Hereafter no purchaser or assignee of such purchaser of any land, town or city lot, at any sale of lots for taxes or assessments, penalties, interests and costs due either to the State or county, shall be entitled to a deed for lands or lots so purchased until the following conditions have been complied with, to wit: Such purchaser or assignee shall serve or caused to be served a written or printed, or partially written and partially printed notice of such purchase on every person in actual possession or occupancy of such land or lot. Also, the person in whose name the same was assessed or taxed, if, upon diligent inquiry he or she can be found in the county. Also, the owners of and parties interested in said land or lot, if they can, upon diligent inquiry, be found in the county, at least three months before the expiration of the time of redemption on such sale. * * * If no person is in possession or occupancy of said land or lot, and the person in whose name the same was taxed or assessed, upon diligent inquiry, cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper of general circulation in said county in which said land or lot is situated, which notice shall be inserted three times. * * * *Provided, however*, That if the owners of said land or lots, or the parties interested therein, cannot be found in the county, and the person in actual occupancy is tenant to, or is in possession under the owner or party interested therein, *then service of said notice upon such tenant* shall be deemed service upon the owner or party interested, etc.

The succeeding sections provide for publication, return, etc., section 131 providing a form of the tax deed.

SECTION 132. Deeds executed by the county treasurer, as aforesaid, shall be *prima facie* evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns to the real estate thereby conveyed, of the following facts:

First. That the real estate conveyed was subject to taxation at the time the same was assessed and have been listed and assessed in the time and manner required by law.

Second. That the taxes or assessments were not paid at any time before the sale.

Third. That the real estate conveyed had not been redeemed from the sale at the date of the deed.

Fourth. That the real estate was advertised for sale in the manner and for the length of time required by law.

Fifth. That the real estate was sold for taxes, assessments, penalties and costs, as stated in the deed.

Sixth. That the grantee in the deed was the purchaser or assignee of the purchaser.

Seventh. That the sale was conducted in the manner required by law.

But any judgment for the sale of real estate for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop the parties from raising any objections thereto or to a tax title based thereon which existed at or before the rendition of such judgment and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered. And as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid or the real estate was not liable to the tax or assessment.

SECTION 136. All lots, tracts and parcels of land heretofore forfeited or sold to counties for delinquent taxes due and remaining unpaid at the date of the approval of this act, etc., shall be deemed to be registered under the provisions of this act, and suit to enforce the payment of such unpaid taxes * * * may be instituted and payment enforced under and by virtue of the provisions of this act as follows: Suit to collect the unpaid taxes of 1890 and previous years may be instituted at any time subsequent to the passage and ap-

proval of this act. * * * Suit to collect the unpaid taxes of 1891 shall be instituted in 1894, at the time and in the manner specified in this act, and all subsequent taxes remaining unpaid shall be collected under the provisions herein set forth.

Section 137 is the repealing clause and section 138 the emergency clause.

The tax title of the defendants in error, which is assailed in this cause, is based upon proceedings had under the laws of 1893 for the collection of taxes of 1891.